REPORTS OF CASES

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM, 1931, AND JANUARY TERM, 1932

VOLUME CXXII

HENRY P. STODDART,
OFFICIAL REPORTER

CLAFLIN PRINTING COMPANY
LINCOLN, NEBRASKA
1932

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By Henry P. Stoddart, Reporter of the Supreme Court,

For the benefit of the State of Nebraska

SUPREME COURT

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NEBRASKA

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UNITED STATES

CONSTITUTION

Amendment XIV, sec. 1 626

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1931

HENRY J. LINDEMAN, APPELLANT, V. CALAMUS IRRIGATION DISTRICT ET AL., APPELLEES.

FILED NOVEMBER 10, 1931. No. 27922.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Ritchie, Swenson & Arey, for appellant.

Guy Laverty and *Morsman & Maxwell, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

PER CURIAM.

This was an action to recover damages for fraud. One of the defendants, Roy M. Harrop, was served with summons in Douglas county, while the Calamus Irrigation District, George T. Tunnicliff, J. C. Bristow, and R. B. Miller, as trustees of said district, were served in Loup county. The defendants served in Loup county filed a special appearance challenging the jurisdiction of the district court for Douglas county, which special appearance was sustained for that neither the petition nor the substituted and amended petition filed by the plaintiff alleged facts sufficient to charge any joint liability on the part of said defendants with the defendant who was served with summons in Douglas county.

The rule is well established in this jurisdiction that, in a personal action for the recovery of money only, where a resident of the county where the action is brought is

joined with a resident of another county, to authorize service upon the latter in the county of his residence, there must be an actual right to recover against the former. *McKibbin v. Day,* 71 Neb. 280; *Morearty v. Strunk,* 118 Neb. 718. This cause of action is based upon the false and fraudulent representations of the defendant Roy M. Harrop, as an officer of said irrigation district. The false representations were concerned with the validity of the bonds which were to pay for the construction work. The plaintiff alleges that as a result of the false and fraudulent representations he was induced to commence construction work or works for the irrigation district, to his damage. In this state irrigation districts are public corporations and the powers of its officers and directors are limited by statute under which it is created. It is admitted by the appellant that he cannot recover against the irrigation district either upon the contract or in *quantum meruit.* The irrigation district concerned was dissolved by *quo warranto* proceedings for that it was never organized as provided by statute. The plaintiff had no valid contract and was without authority to do any work on behalf of the district. The plaintiff was charged with notice of the want of authority on the part of the board and in dealing with them he was required to act with reference to the authority or the limitations and restrictions imposed by legislation. *Lincoln & Dawson County Irrigation District v. McNeal,* 60 Neb. 613. The petition of plaintiff shows on its face that he was aware of the imperative necessity of a judgment of validity in the district court for Loup county and he also knew there was a contest in these validity proceedings. The question of the validity of the bonds from which the money was to come to pay for the works was a matter of public record. It was a matter concerning which neither the district nor Roy M. Harrop, secretary and universal agent, had authority to make, since neither the Calamus Irrigation District nor those acting as officers and directors had any power to bind the district by a valid contract. The plaintiff was bound to take notice of such lack of authority, and therefore the district could not be responsible for the

false and fraudulent representations in respect to such power. There was therefore no joint or common liability against the defendants, Roy M. Harrop, the Calamus Irrigation District, George T. Tunnicliff, J. C. Bristow, and R. B. Miller, as trustees of the Calamus Irrigation District.

The judgment of the district court is

AFFIRMED.

FRED SCHLEUNING ET AL., APPELLANTS, V. KATE TATRO ET AL., APPELLEES.

FILED NOVEMBER 10, 1931. No. 27933.

APPEAL from the district court for York county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

G. W. France and *Charles F. Stroman,* for appellants.

Elmer E. Ross, Donald F. Sampson and *W. W. Wycoff, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and RAPER and RYAN, District Judges.

PER CURIAM.

This is an action brought pursuant to sections 20-2001 and 20-2002, Comp. St. 1929, by Fred Schleuning and George Schleuning, by E. Robinson, their next friend, to vacate a judgment in partition and the sale of premises thereunder, entered in, and made by, the district court for York county, wherein Kate Tatro, Steven Tatro, her husband, and John C. Schleuning were plaintiffs, and Fred Schleuning and George Schleuning (plaintiffs and appellants in the present proceeding) and Otto Schleuning and Lizzie Schleuning were defendants. The final order of confirmation of the referee's sale made in this partition proceeding was entered on the 9th day of December, 1929.

From appellants' brief we learn: "Prior to the 10th day of January, 1902, Catherine Schleuning and her husband, Adam Schleuning, mother and father of the appellants, Fred Schleuning and George Schleuning, and of the appel-

lees, Kate Tatro, John C. Schleuning, Lizzie Schleuning and Otto Schleuning, were living upon the land involved herein (here follows description of land), the record title thereof standing in the name of the mother, Catherine Schleuning.

"On or about the 10th day of January, 1902, the said Catherine Schleuning died, testate, leaving surviving her the said husband, Adam Schleuning, and the six children designated and named above, the said Kate Tatro being the only child ever married, and all now and at times herein mentioned living.

"Her estate was duly probated in York county and, as provided by the terms of her will, the husband, Adam Schleuning, was given a life interest in the said land (the premises here in suit) *and at his death it was to be divided share and share alike between the six children.*

"The father, Adam Schleuning, died in March, 1917, and thus the title to said quarter section of land became vested in the said six Schleuning children or heirs herein named share and share alike.

"From the date of the purchase of the land herein involved, many years prior to 1902, the year of the death of Catherine Schleuning, the mother, until about March, 1931, this land was lived upon, occupied, cultivated by the Schleunings. During said long period of years Kate Schleuning married Steven Tatro and now is and for many years has been living at Central City, Nebraska, and John C. Schleuning, the youngest of said six children, left the family home many years ago and now is and has been for a long time living in Los Angeles, California; after the death of the father and mother, Fred, George, Otto and Lizzie remained upon said land; some time in 1929 Otto and Lizzie moved off the said home place, leaving Fred and George thereon, and they remained there until March, 1931, when they were forcibly removed by the sheriff of York county, Nebraska, under a writ of restitution, arising out of and from the partition suit, the judgment in which action this suit is brought to vacate and set aside."

To the amended petition of the plaintiffs herein separate demurrers were filed by the defendants based on the reasons that the amended petition "does not state facts sufficient to constitute a cause of action," and that "several causes of action are improperly joined" therein. These demurrers were sustained by the district court, and the plaintiffs electing to plead no further, the action was dismissed. From this order of dismissal, appellants, plaintiffs below, prosecute this appeal.

The express provision of our statute governing the matter before us is: "The proceedings to vacate or modify the judgment or order on the grounds mentioned in subdivisions four, five, * * * seven (on which appellants rely) * * * of the last preceding section, shall be by petition verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant." Comp. St. 1929, sec. 20-2002. The amended petition of appellants, to which demurrers were sustained, did not contain a "defense to the action." The facts conceded in this pleading entitle the defendants to a decree in the partition action confirming the shares and directing sale. Indeed the prayer of this amended petition is an implied admission of this fact. It is, in part, that a mortgage on the premises executed by the purchaser at the partition sale "be ratified and confirmed;" that then the "referee be ordered and directed again to offer said land for sale," etc. The gist of appellants' complaint may be said to be: (a) That Fred Schleuning was at all times material to this action a man of "weak mind and low mentality;" that George Schleuning was in like manner "an imbecile" and "actively psychotic and notoriously insane;" (b) that the plaintiffs in the partition case well knew these facts, but failed to advise the court by appropriate allegations, and failed to have a guardian *ad litem* appointed for the appellants; (c) that as a necessary consequence the land was sold for $12,008, instead of $13,008, which it otherwise would have brought, and a loss was caused of certain buildings which have been erected on the premises by them, and all of which

might be removed without damage to the land, and appellants were also deprived of 65 acres of wheat planted by them on the premises subsequent to the commencement of the action in partition. It may be said in passing that neither size, plan, material or value of any of the improvements is alleged by the pleaders, nor is the condition or value of the planted wheat set forth by them.

In answer to the basic contention of appellants, it may be said that the general rule is that failure to appoint a guardian *ad litem* for an insane defendant is, at most, only erroneous, for which the appropriate remedy is by a proceeding in error, and not by an original action to vacate the judgment. *McAllister v. Lancaster County Bank*, 15 Neb. 295; *Kuhn v. Kilmer*, 16 Neb. 699; *McCormick v. Paddock*, 20 Neb. 486.

It seems, however, that the express provisions of the statute governing partition in this state are controlling in this controversy. Appellants' amended petition expressly admits that appellants "were served with summons." This language, in view of total absence of allegations to the contrary, as well as the rule that allegations of a pleading are construed against the pleader, justifies the inference that appellants were properly served with summons as provided by law. In this connection it is expressly provided: "The defendants (in an action for partition) may be served in the same manner as in ordinary civil action by summons, or by publication as provided in this Code, and when all the parties in interest have been duly served, any of the proceedings herein prescribed shall be binding and conclusive upon them all." Comp. St. 1929, sec. 20-21,106. Also: "Upon report of the referee or referees being confirmed, judgment thereon shall be rendered that the partition be firm and effectual forever." Comp. St. 1929, sec. 20-21,105. And further: "The judgment of partition shall be presumptive evidence of title in all cases, and as between the parties themselves it is conclusive evidence thereof, subject, however, to be defeated by proof of a title paramount to, or independent of, that under which the parties held as joint tenants or tenants in common." Comp. St. 1929, sec. 20-21,107.

In addition to the statutes quoted, whose express terms apparently control, this tribunal is committed to the view that "District courts have jurisdiction under the Constitution and the Code to partition real estate; and, when all of the parties interested in a tract of land are before the court in such suit, its judgment fixing the shares of the parties, directing partition, and later confirming a sale of said real estate is final, and the parties thereto, in the absence of fraud upon the face of the proceedings, are estopped thereby, although said judgment is erroneous and would have been reversed on appeal." *Kazebeer v. Nunemaker*, 82 Neb. 732. Also, see *Federal Land Bank v. Tuma*, 116 Neb. 99; *Manfull v. Graham*, 55 Neb. 645; *Security Abstract of Title Co. v. Longacre*, 56 Neb. 469; *Citizens State Bank v. Haymes*, 56 Neb. 394.

The allegations of the petition with reference to the purchaser, carefully considered, wholly fail to allege facts supporting the conclusion that the purchaser in any manner participated in the fraud alleged, or that in any manner affected his character as a *bona fide* purchaser. Therefore it appears that he is within the rule that a *bona fide* purchaser under a decree of partition will be protected by section 20-1541, Comp. St. 1929, even though the judgment is thereafter reversed. *Kazebeer v. Nunemaker*, 82 Neb. 732; *Federal Land Bank v. Tuma*, 116 Neb. 99; *Pauley v. Knouse*, 109 Neb. 716; *Coates v. O'Connor*, 102 Neb. 606.

It follows therefore that the proceedings had and orders entered in this cause, after service of summons duly made on the appellants, were binding and conclusive upon them, and that the action of the trial court in sustaining demurrers to their petition in the instant proceeding was right, and it is

AFFIRMED.

SIDNEY A. TROBOUGH V. STATE OF NEBRASKA.

FILED NOVEMBER 10, 1931. No. 27975.

ERROR to the district court for Webster county: J. W. JAMES, JUDGE. *Affirmed.*

F. L. Carrico, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

PER CURIAM.

Sidney A. Trobough was informed against in Adams county and there charged with having committed murder in the first degree, in that on November 23, 1928, he purposely and of his deliberate and premeditated malice shot his wife with a revolver, as a result whereof she died the same day.

This is the third appearance of this case here. At the first trial the defendant was sentenced to serve 18 years in the penitentiary, and at the second trial he was sentenced to 25 years of servitude. On appeal, both sentences were reversed. *Trobough v. State,* 119 Neb. 128; *Trobough v. State,* 120 Neb. 453.

In the present trial a change of venue was granted and thereupon the action was removed to Webster county. Upon submission there the jury found the defendant guilty of manslaughter and he was thereupon sentenced to serve a term of 10 years in the penitentiary. From the judgment so rendered the defendant has brought the record here for review.

The following facts appear to be fairly established: The defendant and his wife had been married almost two years when the tragedy occurred. The defendant was 17 years of age and his wife was 19 when they were married. They had one child and at the time of the trial he was about 16 or perhaps 18 months of age.

On the night of November 23, Vern Tooley, a married man who roomed at the Trobough home, and Lulu Claus, who also at one time roomed there, and two other guests were at the defendant's home for the evening meal. During the meal the defendant left the table and, upon his return a few minutes thereafter, he ruffled his wife's hair. Thereupon Lulu Claus made a reproving remark in respect of

this action, to which the defendant replied, "Keep still or I will slap you." Thereupon Tooley and the defendant both started for the door, the defendant having first taken his revolver down from the wall near the kitchen door. They were induced to return to the table, however. During the course of the evening it appears from the record that the defendant "playfully" discharged his revolver into the floor to "scare" certain of the persons that were present. When the Claus girl left the Trobough home later in the evening, the defendant told her she need not return to his home. Tooley accompanied her to a taxicab and he then went into the room which he occupied at the Trobough home. Thereupon it appears that the defendant's wife remarked, with reference to Miss Claus' departure, that she, Mrs. Trobough, "didn't see why she couldn't have her friends out there," when the defendant had his friends there. The defendant testified that he then went into the kitchen, and that, just as he reentered the dining-room where his wife was seated in a chair, he heard a shot. According to his evidence, his wife then suddenly arose to her feet and he caught her in his arms, but he was too weak to hold her and he laid her down on the floor. It appears that Tooley entered the dining-room almost immediately after the shot was fired, and very shortly thereafter a physician was called. The defendant meanwhile saw the gun on the floor near his wife, and he testified that he "grabbed it off of the floor and broke it and threw the shells down the register."

Tooley testified that, after he retired to the bedroom which he occupied at the Trobough home, and while he was sitting on the edge of the bed, he heard a shot, and Mrs. Trobough cried out and said: "Vern, he shot me." Tooley also stated that he subsequently inquired of the defendant if he knew the consequence of his act, and the defendant replied: "My God! no." According to Tooley's evidence it also appears that the defendant and he had been engaged in bootlegging. And shortly before the sheriff arrived, Tooley, the defendant, and the defendant's brother-in-law hid a collection of jugs and bottles.

Dr. Green, the physician who was called by the defendant, testified that Mrs. Trobough was dead when he arrived. He testified that the left common carotid artery had been punctured, thereby causing a hemorrhage from which Mrs. Trobough died.

It appears that Dr. Green, after ascertaining that Mrs. Trobough was dead, probed the wound to locate the bullet. The defendant contends that, had his wife been alive when the physician arrived, the probing, and not the bullet, caused the hemorrhage. But we think the evidence conclusively discloses that the bullet was the direct cause of Mrs. Trobough's death.

Dr. Green was a witness in both of the former trials of the defendant and his testimony at the second trial was read into the record of the present trial. The defendant contends that this constituted reversible error, and that the court therefore erred in overruling his motion for a continuance to the end that he might procure Dr. Green's presence as a witness at the present trial. The court, however, granted leave to the defendant to obtain a deposition of the physician, but the defendant did not avail himself of the offer. However, the evidence of two other physicians appears in the record before us and, in view of this fact and of the fact that the defendant did not avail himself of the opportunity granted by the court to obtain Dr. Green's deposition, we do not think the defendant was prejudiced in respect of the court's ruling. Nor do we find that the court abused its discretion in overruling the defendant's motion for a continuance.

Objection is also made to the fact that the court permitted the testimony of Lulu Claus at a former trial to be read into the record at the present trial. But it appears that this witness could not be found and, in view of this fact, we do not think the court erred in the premises. It is elementary that the evidence of a witness at a former trial may be read at a later trial, where such witness cannot be located to testify at a subsequent trial of the same case. *Koenigstein v. State,* 103 Neb. 580; *Meyers v. State,* 112 Neb. 149.

Nor do we find reversible error in the admission of the evidence of certain other witnesses of which complaint is made. And after an examination of the various instructions complained of, we do not find that the defendant was prejudiced by those given nor by those refused by the learned trial judge.

The record in the present trial is voluminous and considerable variance appears in the testimony of the defendant and Tooley, as well as some other witnesses. But from the defendant's own evidence it appears that he carelessly shot into the floor of his home in the early part of the evening of the tragedy; that there was liquor in his home; and that, just before he went into the kitchen, before his wife was shot, the gun in question was hanging on the dining-room wall which was immediately adjacent to and near the kitchen door. And Tooley, at that time, was in his bedroom preparing to retire.

Three juries have heard the evidence and each jury found the defendant guilty. And, besides, the defendant was granted a change of venue from Adams county, the county of his residence, to Webster county in the present case. The jury, as triers of fact, having heard the evidence and having observed the demeanor of the witnesses while they were testifying, found that the defendant was guilty. Under the circumstances and under the record before us, we decline to reverse the finding so made by the jury.

The judgment must be and it hereby is

AFFIRMED.

MAURICE CASEY, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED NOVEMBER 10, 1931. No. 27865.

1. **Negligence**: ACTION: DISMISSAL. In an action for negligence, plaintiff is not entitled to relief, where undisputed evidence shows that he brought upon himself the injuries of which he complains.
2. **Trial**: DIRECTION OF VERDICT. Where the evidence is insufficient to sustain a verdict in favor of plaintiff, it is error to overrule a motion to direct a verdict in favor of defendant.

APPEAL from the district court for Dixon county: MARK J. RYAN, JUDGE. *Reversed and dismissed.*

Byron Clark, Jesse L. Root, J. W. Weingarten and *Sidney T. Frum,* for appellant.

McCarthy & McCarthy and *M. F. Harrington, contra.*

Heard before ROSE, GOOD and DAY, JJ., and MESSMORE and NISLEY, District Judges.

ROSE, J.

This is an action to recover $574 in damages for alleged negligence of defendant in so constructing embankments and waterways on its railroad right of way as to flood portions of the lands of plaintiff in Otter creek valley, Dixon county, thus causing the destruction or loss of oats, barley, potatoes, chickens and lumber owned by him.

In Otter creek valley plaintiff owns a farm consisting of a dwelling-house, other farm buildings, and 160 acres of land, except land for defendant's railroad right of way, land for a right of way for a public highway and land for a right of way for a ditch. These right of ways are on parallel lines, extend east and west and intersect the land of plaintiff, leaving the larger portion on the south and the smaller portion and the farm buildings on the north. The railroad right of way is contiguous to the right of way for the ditch, which is north of the railroad, and the railroad right of way is also contiguous to the right of way for the highway, which is south of the railroad. The general course of Otter creek is eastward. The current of the stream in the original channel approached plaintiff's farm buildings from the northwest, passed near them, turned south about 500 feet from them, crossed all the right of ways on the west side of a loop south of them, meandered eastward and, turning north, recrossed the same right of ways on the east side of the loop 800 feet from the west side of the loop. Before the right of ways for the highway and the ditch were granted, defendant's railroad crossed Otter creek on a bridge 130 feet long over

the west side of the loop. Under the same railroad track there was a similar bridge 800 feet further east over the east side of the loop. In 1926 the state department of public works and the county of Dixon constructed the public highway on plaintiff's land south of the railroad on a fill 17 feet high across the natural channel of Otter creek near plaintiff's farm buildings, filling the old channel at the crossing, cut off the loop of the creek south of the right of ways and dug on the north side of the railroad a cut-off ditch into which the waters of the stream were turned. Afterward defendant made fills where the bridges had been and increased the capacity of the ditch.

Personal property of plaintiff was injured by flood waters October 15, 1928, and in his petition he pleaded in substance that defendant failed to provide an adequate cut-off ditch, filled the openings in its right of way under the bridges without leaving adequate openings in the embankments for the passage of flood waters, dammed them up, and turned them back on the premises of plaintiff, thus causing the damages of which he complains.

In addition to a general denial, defendant answered in effect, among other things, that plaintiff, for his own benefit, knowingly participated in the acts upon which his claim for relief is based and brought the damages upon himself.

Upon a trial of the issues, the jury rendered a verdict in favor of plaintiff for $520. From a judgment therefor defendant appealed.

The principal assignment of error is directed to the overruling of a motion by defendant for a peremptory instruction in its favor on the ground that the evidence is insufficient to prove a cause of action in favor of plaintiff and against defendant.

Plaintiff sold to Dixon county the land for the right of ways for the highway and the ditch. He filed his claim against Dixon county April 28, 1926. This claim and his own testimony prove that he sold to Dixon county 5.04 acres of land for the right of way for the highway through his farm and 98/100 of an acre on the north side of defendant's railroad through his farm for the right of way

for the cut-off ditch. His claim for the land, fence and incidental damages amounted to $1,304.25, which the county paid. On the face of his claim he imposed on the county the following conditions:

"This claim is filed with the understanding that a cattle pass is furnished to meet a point opposite railroad pass; also a culvert of 18 inches in diameter to carry natural flow of water.

"This claim is to be void unless cattle pass is furnished and culvert provided and maintained for natural flow of water."

Acting under plaintiff's grant and terms, the county and the state department of public works constructed the highway on a fill or embankment 17 feet high across the natural channel of Otter creek on the west side of the southern loop described, without any openings in the solid wall except the cattle pass and an 18-inch pipe. The channel on the east side of the loop was also filled by the state and Dixon county except for an 18-inch pipe. The entire southern loop of the natural channel south of the highway was thus cut off, the west fill being near plaintiff's buildings. The distance between the center of the highway and the center of the railroad was 83 or 84 feet. North of the railroad the state and county also cut a ditch on the right of way purchased from plaintiff. The purpose of this ditch was to carry the waters of Otter creek eastward north of the railroad track to the natural channel of the stream. Plaintiff did not notify or consult defendant in regard to these plans or to this work. Defendant had no part in the undertakings except to voluntarily increase the carrying capacity of the ditch north of and adjacent to its right of way. There is nothing to show that the state or Dixon county consulted defendant in respect to the contemplated changes. After the state and county constructed the highway, filled the old channel as indicated, and dug the ditch, defendant made fills where its bridges crossed the abandoned channel of Otter creek, leaving in the new railroad embankment a cattle pass and pipes corresponding in size, elevation and location to the openings left in the highway embankment

pursuant to plaintiff's specifications. Plaintiff stood by without objection or protest until all these changes had been made, though he had owned his farm for ten years.

The facts outlined are established by, or necessarily inferred from, undisputed evidence. Prior to the shifting of the channel of the creek to the cut-off ditch north of the railroad, the openings under the railroad bridges permitted the free passage of the stream. They could not serve that purpose after the highway embankment filled the natural channel of Otter creek a few feet below the bridges. Plaintiff's property was not damaged by floods before the channel was changed. The change from natural conditions which did not injure plaintiff was the enterprise of the state, the county of Dixon and plaintiff, not defendant. After the southern loop of Otter creek had been cut off and the channel of the stream changed to the north side of the railroad, the railroad bridges were unnecessary. As already stated, the openings in the new railroad embankment corresponded to the specifications for the openings in the parallel highway embankment a few feet further south —terms exacted by plaintiff himself as conditions of granting the right of ways for the highway and the ditch. The better view of the undisputed evidence seems to be that, as to defendant, plaintiff brought upon himself the injury of which he complains. The conclusion is that the motion to direct a verdict in favor of defendant should have been sustained. The judgment of the district court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

CAROLINE WARD, APPELLEE, V. WILLIAM J. HISLOP ET AL., EXECUTORS, ET AL., APPELLANTS.

FILED NOVEMBER 10, 1931. No. 27953.

1. **Quære.** Whether an oral contract of a married woman to devise realty and bequeath personalty is valid as to after-acquired property, *quære?*
2. **Specific Performance:** PAROL CONTRACT FOR DEVISE AND BEQUEST: PROOF. A parol contract, devising realty and bequeath-

ing personalty, can be established only by evidence that is clear, convincing and satisfactory.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Reversed and dismissed.*

Battelle, Travis & Strehlow, for appellants.

Wear, Moriarty, Garrotto & Boland, contra.

Heard before ROSE, GOOD, DAY and PAINE, JJ., and BEGLEY, District Judge.

GOOD, J.

In this action plaintiff seeks specific performance of an alleged oral contract to devise realty and bequeath personalty to her. Defendants are the next of kin of Mary Ellen Voorhees, deceased, executors of her last will and testament, and legatees mentioned in said will.

Plaintiff alleged that in December, 1900, Mr. and Mrs. Voorhees requested of plaintiff's parents the privilege of taking the plaintiff with them to live as their child, and that plaintiff's parents consented to such request and allowed Mr. and Mrs. Voorhees to take the plaintiff on the following expressed conditions: That plaintiff's parents would give to Mr. and Mrs. Voorhees her custody, care and control, in consideration and on agreement that Mr. and Mrs. Voorhees would receive said child as their own, care for her, rear and educate her, and that at their death the plaintiff should receive their entire estate, including all the real and personal property of which they might die possessed. Plaintiff averred that she went to live with Mr. and Mrs. Voorhees at the time and on the terms mentioned aforesaid, and continued to live with them uninterruptedly until they died; that Mr. Voorhees died on the 5th of February, 1925, and Mrs. Voorhees on the 27th of April, 1930.

Defendants denied the making of the oral contract and denied that plaintiff had performed her part of the alleged contract by continuously living with the Voorhees family as a daughter. The trial court found for plaintiff and entered a decree awarding plaintiff one-half of the estate of Mrs. Voorhees. Defendants have appealed.

At the outset it may be observed that, if the contract was made, as alleged, it is of doubtful validity. Mrs. Voorhees was at that time a married woman. There is no showing that she then possessed any separate estate, and the evidence fairly shows that the bulk of the estate which she left came to her under the will of her husband 25 years later.

This court has frequently held: "The contract of a married woman can only be enforced against the separate estate which she possessed at the date of the contract." *Kocher v. Cornell,* 59 Neb. 315. See *Grand Island Banking Co. v. Wright,* 53 Neb. 574; *Marsh v. Marsh,* 92 Neb. 189; *Giltner State Bank v. Talich,* 115 Neb. 236. However, since that question was not raised or discussed in the briefs or on oral argument, we refrain from determining the question in the instant case.

At the date of the alleged oral contract, plaintiff was 16 years of age, and Mr. and Mrs. Voorhees had no children of their own. The only witness who testified to the alleged contract was a sister of the plaintiff. According to her testimony, plaintiff, for about two weeks prior to the date of the alleged contract, had been staying in the Voorhees family. With their mother, plaintiff and witness went to the Voorhees home, when, as testified by her, the following occurred: Mrs. Snyder (plaintiff's mother) "wanted Carrie (the plaintiff) to come home with her." The mother said: " 'You know Dad and Carrie don't get along,' and Mrs. Voorhees spoke up and said, 'Let her stay with us, make her home with us;' and she turned to Mr. Voorhees, whom they called Dad, and said, 'We would like to have her stay with us, wouldn't we?' and he said, 'We sure would.' " Mrs. Snyder said: "I would like very much to have Carrie come home with me, but if she does not want to, and you will promise that you will take care of her, she can stay." Mrs. Voorhees answered: " 'Dad, when we are gone,' she said, 'everything we have will be left to Carrie and Lester, and I will leave one dollar to my brother,' to which Mrs. Snyder said, 'All right, then, I will trust that you take care of Carrie, and I will leave her.' "

The foregoing constitutes the direct evidence of the contract. A number of witnesses testified to subsequent conversations with Mrs. Voorhees, in which she referred to plaintiff as her daughter, and to statements that when she was gone everything would belong to plaintiff. At another time, when the home was being repaired, Mrs. Voorhees is alleged to have said to plaintiff: "You go ahead and fix the house to suit yourself, as it is going to be yours." There is considerable evidence on behalf of plaintiff to the effect that thereafter plaintiff stayed and made her home with the Voorhees family.

On the other hand, there is evidence that the Voorhees home, at that time and for several years subsequently, was a bungalow, with six rooms, and having three bedrooms; that two young men, or boys, for one of whom Mr. Voorhees was guardian, were staying in the Voorhees home; that Mr. and Mrs. Voorhees occupied one of the bedrooms and each of the boys occupied another; that plaintiff did not stay at the Voorhees home, but was there occasionally, working and helping Mrs. Voorhees with the housework. There is evidence that plaintiff worked out as a seamstress, and spent considerable time in Sioux City, Iowa, but made occasional visits to the Voorhees home; that she worked at other times, earning wages, and purchased her own clothing. Mr. Voorhees died in 1925, and left a will, dated two or three years after the date of the alleged contract, in which he devised and bequeathed all of his property to Mrs. Voorhees. Mrs. Voorhees made a will in 1926, in which she devised to plaintiff the residence property, in which she was then living, valued at, perhaps, $3,000, together with some articles of personalty, and devising and bequeathing the remainder of her property to charitable institutions and various persons. Two or three years later she made another will, in which she left nothing to the plaintiff, but did make a substantial bequest to plaintiff's daughter, and bequeathed the remainder of her property to charitable institutions, relatives and various other persons. It also appears that Mrs. Voorhees was rather close in money matters. It may be said that the statements,

which would constitute the oral agreement, if made, were without any deliberation; were made upon the spur of the moment, and would cover all the property which Mr. and Mrs. Voorhees possessed, amounting in value to from $40,000 to $60,000. The time consumed during the conversation would be less than two minutes. It would be a remarkable and very unusual circumstance for one of Mrs. Voorhees' disposition, with reference to finances, to make such an agreement, without any deliberation or consultation about it with her husband or with any one else, other than as shown above. Moreover, the evidence of the witness who testified to the contract was contradictory in several respects, and it is noticeable that, although more than 30 years had elapsed, she purported to give the exact conversation that occurred, even stating particularly where in the house each of the persons was, and what each was doing, but, upon subsequent events, her memory was rather vague and uncertain. It would seem improbable that one of Mrs. Voorhees' disposition would make such a contract under the circumstances as detailed in the testimony; but, taken together with all the other evidence in the case, it falls far short of meeting the requirements of the well-established rule in this state. This court has frequently held that contracts of this character may be sustained only when the evidence thereof is clear, convincing and satisfactory. *Labs v. Labs*, 92 Neb. 378; *Overlander v. Ware*, 102 Neb. 216; *Powers v. Norton*, 103 Neb. 761; *Remaly v. Sweet*, 106 Neb. 327; *McEntarffer v. Payne*, 107 Neb. 169; *Young v. Gillen*, 108 Neb. 311; *Hajek v. Hajek*, 108 Neb. 503; *Smith v. Raubach*, 121 Neb. 703. Moreover, the evidence clearly falls short of proving full performance of the contract by plaintiff. The weight of the evidence is that she did not stay at the Voorhees home except at intervals, in the daytime, and occasionally at night when Mr. Voorhees was absent. The evidence given by plaintiff's witnesses does not substantiate the contract alleged in the petition. It also appears that after the death of Mrs. Voorhees plaintiff procured her attorney to write to Lester Dunlevy, seeking to enlist his aid in establishing a contract

whereby the Voorhees property was to be devised to them jointly. There are other acts of plaintiff, as shown by the testimony, that are wholly inconsistent with the existence of the alleged contract.

It follows that the judgment of the district court is erroneous. It is hereby reversed, and the action dismissed.

REVERSED AND DISMISSED.

FRANK BARRY, APPELLANT, V. KENNETH D. HORTON, APPELLEE.

FILED NOVEMBER 10, 1931. No. 27892.

1. **Execution.** "The right of a judgment creditor to take out an execution on his judgment is a substantial right; and this right can only be taken away or suspended by some act, suit or proceeding for this purpose in compliance with law." *Halmes v. Dovey*, 64 Neb. 122.
2. ———. A judgment creditor has the right to have an execution levied upon the goods and chattels of the debtor, but if no goods or chattels can be found the officer shall indorse on the writ of execution "no goods," and forthwith levy the writ of execution upon the lands and tenements of the debtor which may be liable to satisfy the judgment, and is entitled to have the lands and tenements sold on execution sale, subject to all liens prior to the lien of the judgment on which the execution was made.
3. ———: SALE. Where an execution sale is had and the lands and tenements of the debtor are not sold subject to prior liens thereon, it is not error for the trial court to overrule a motion to confirm such sale.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

William Niklaus and *John E. Mockett*, for appellant.

Burkett, Wilson, Brown, Wilson & Van Kirk, Sterling F. Mutz and *F. J. Patz, contra.*

Heard before ROSE, GOOD and DAY, JJ., and MESSMORE and NISLEY, District Judges.

MESSMORE, District Judge.

This is an appeal from the action of the district court for Lancaster county overruling a motion to confirm an execution sale had upon a judgment at law and sustaining objections to the confirmation of such sale.

The facts disclose that upon the 7th day of August, 1929, Frank Barry, appellant, recovered a judgment in the sum of $305.40 against Kenneth D. Horton, appellee, in the municipal court of Lincoln, Lancaster county, and on the 8th day of August, 1929, a transcript of said judgment was filed in the office of the clerk of the district court for said county and recorded in the execution docket; that at the time of the filing and recording of said judgment appellee Kenneth D. Horton was the owner in fee simple of lot 3, block 13, Martin Heights Addition to Lincoln, in said county, against which there was of record a mortgage in favor of the American Savings & Loan Association in the sum of $3,700, which was duly filed and recorded in the office of the register of deeds of Lancaster county on the 25th day of April, 1929. There were also two mechanics' liens of record, one in favor of the Holland Lumber Company in the sum of $1,345.93 and one in favor of the Reimers-Kaufman Company in the sum of $150.04, both of which were first liens against the real estate above described.

On August 10, 1929, the Holland Lumber Company filed its petition in the district court for Lancaster county against Kenneth D. Horton et al. to foreclose its mechanic's lien. In June, 1929, the United States Supply Company filed its mechanic's lien with the register of deeds of said county and on the 9th day of September, 1929, filed its petition in the district court for Lancaster county against the said Kenneth D. Horton to foreclose said lien. By order of said court the said two actions were consolidated and known as Holland Lumber Company v. Kenneth D. Horton. The American Savings & Loan Association was made a defendant in said actions and filed its answer and cross-petition in said action as consolidated for the purpose of foreclosing its mortgage bond of $3,700. A decree was

entered in said action on the 9th day of June, 1930, by the terms of which it was decreed that the Holland Lumber Company had a lien against said property in the sum of $1,345.93 and that the Reimers-Kaufman Company had a lien against said property in the sum of $150.04, both of which were first liens as against said property, and by order of the court the bond and mortgage of the American Savings & Loan Association were left undetermined because service had not been obtained by said association upon the defendant Kenneth D. Horton; that thereafter said property was sold under the terms of said decree by the sheriff of Lancaster county to the Holland Lumber Company and the Reimers-Kaufman Company, which companies later duly conveyed said property to said association, said association paying therefor to the Holland Lumber Company the sum of $1,369.43 and to the Reimers-Kaufman Company the sum of $152.66; that there was due said association from the said Kenneth D. Horton on the mortgage aforesaid the sum of $3,838.38 with interest thereon at the rate of 10 per cent. per annum from January 1, 1930, which was a lien against said property subject only to the liens of said Holland Lumber Company and the Reimers-Kaufman Company. The judgment creditor, Frank Barry, was not made a party to the foreclosure proceedings above set out.

On October 8, 1930, Frank Barry, the judgment creditor, caused an execution to be issued out of the district court for Lancaster county, directing the sheriff to levy upon the real estate above described. Accordingly, the sheriff levied upon said real estate, which was advertised for sale as provided by law and sold on November 11, 1930; the said Frank Barry bidding $171 for the same.

On November 12, 1930, a motion to confirm said sale was filed in behalf of the said Frank Barry in said court. The American Savings & Loan Association filed objections to the confirmation of sale, setting up that the property heretofore described was theretofore sold at a judicial sale under an order of court in the case entitled "Holland Lumber Company v. Kenneth Horton," the sale being on liens

on which there was due $1,495.97 which were prior to the lien of the said Frank Barry, and that thereafter the purchasers at said sale transferred their interests in said property under said decree to said association, which is now the owner and holder of said property; that said association had set up its bond and mortgage by cross-petition in that action, showing the sum due it to be $3,838.38, which lien is a prior lien to the lien of the said Frank Barry; that said action of the Holland Lumber Company v. Kenneth Horton was left open for further determination of the amount due said association, it having failed to obtain service on the said Horton, the mortgagor; further objecting, said association sets up that there is an action pending in the district court for Lancaster county to determine the rights of the said Frank Barry and to compel him to redeem from the liens set up in case of Holland Lumber Company v. Kenneth Horton, and upon failure to redeem to have the title quieted in said association as against the lien of the said Frank Barry; further objecting to the confirmation of sale, said association states that the property involved herein was not, at the time of the sale and the issuance of the execution herein, subject to sale as the property of the defendant Horton, the title to said property having divested from the said Horton prior to the time of the issuance of the execution herein; that the sheriff had no authority to sell said property under execution, as it did not belong to the said Horton; that the said Horton had no interest in said property, and that the American Savings & Loan Association is entitled to be subrogated to the rights of its mortgage and the mechanics' liens.

The court below overruled the motion to confirm the sale and the judgment creditor, Frank Barry, appeals.

From this statement and history of facts the question raised by appellant is whether or not he lost his right to enforce his judgment lien by execution and levy because of the foreclosure proceedings and the acquisition of title to the property by the American Savings & Loan Association after the attachment of the judgment lien.

On August 8, 1929, when the transcript of the judgment

of the judgment creditor, Frank Barry, was filed in the office of the clerk of the district court for said county, the lien of his judgment then attached. Prior to that lien were two mechanics' liens and a mortgage, all of record.

On October 8, 1930, when the execution on appellant's judgment was ordered out, we find that the Holland Lumber Company and the Reimers-Kaufman Company had foreclosed their liens, their actions for such foreclosures having been consolidated in one action, and that said lienors had purchased the property in question for the amounts of their liens. Subsequently said lienors conveyed their interests in the property to the American Savings & Loan Association, the association paying therefor the amounts of said liens. Therefore, the association had the record title, with the fact that Frank Barry, the judgment creditor, was not made a party to the foreclosures of the mechanics' liens.

"The right of a judgment creditor to take out an execution on his judgment is a substantial right; and this right can only be taken away or suspended by some act, suit or proceeding for this purpose in compliance with law." *Halmes v. Dovey*, 64 Neb. 122.

Had said judgment creditor been made a party to the foreclosures of the mechanics' liens, his judgment lien would have been subsequent to said liens and the mortgage of the American Savings & Loan Association. The fact that he was not made a party to such foreclosures does not in any sense expunge or do away with the prior liens against the property in so far as the judgment creditor is concerned. The judgment creditor had the right to issue out an execution on his judgment and sell any interest the judgment debtor may have had in the property subject to all prior liens. The real estate was not sold on execution sale in behalf of the judgment creditor subject to all the prior liens thereon.

In case of *Hibbard v. Weil & Kahn*, 5 Neb. 41, this court said: "A sale upon execution vests in the purchaser all the rights of the judgment debtor to the property, but that right is subject to all liens prior to the lien of the judgment on which the execution sale is made." This has been the law of this state for many years.

In the objections of the American Savings & Loan Association to the confirmation of sale, we find that said association had started an action in said district court against appellant Frank Barry, judgment creditor, to require him to redeem said property from said liens or have the title to said premises quieted in the association as against the said Barry. This action we will not discuss nor the rights of the parties thereunder.

We are committed to the rule, as heretofore set out, that a judgment creditor has the right to take out an execution on his judgment and under it to sell the property and take whatever interest the judgment debtor may have therein by virtue of said sale under execution, provided the property was sold under execution subject to all prior liens thereon. In this case under the execution sale the property was not sold subject to the prior liens thereon and the trial court was correct in refusing to confirm the sale thereunder. The judgment of the trial court is therefore

AFFIRMED.

MAY GROSS, APPELLANT, V. WILLIAM F. GROSS, APPELLEE.

FILED NOVEMBER 20, 1931. No. 27825.

1. **Divorce: CUSTODY OF CHILDREN.** Custody of minor children awarded their mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree, unless it is shown that the mother is an unfit person to have their custody, or that their best interests require such action.
2. ———: ———. Under facts outlined in the opinion, *held*, the mother is a proper person to have the custody of her three minor children.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Reversed, with directions.*

Frost, Hammes & Nimtz and *Howard Saxton*, for appellant.

John A. McKenzie, contra.

Heard before ROSE, GOOD and DAY, JJ., and MESSMORE and NISLEY, District Judges.

PER CURIAM.

On the 9th day of December, 1921, the plaintiff, May Gross, by constructive service, obtained a decree of divorce from the defendant, William F. Gross, in the district court for Douglas county, Nebraska. Said decree was obtained on the grounds of extreme cruelty, adultery, and desertion of the plaintiff and their minor children. Plaintiff was also given the sole care and custody of their four minor children, two girls and two boys. On the 14th day of June, 1930, the defendant filed a petition to modify the above divorce decree, alleging that plaintiff was not a fit person to have the care and custody of their three minor children, and praying that he be given said children. The plaintiff filed an answer and cross-petition to the petition of the defendant, denying that she is an unfit person to have the care and custody of said children, and alleging that the defendant is an unfit person to have the custody of said children; that she be allowed $6,160 for past maintenance of their said children, and $75 a month support money and $500 suit money. Upon these issues, said cause was tried by the district court, and on the 30th day of September, 1930, the court entered a decree modifying the former divorce by giving the defendant the custody of their two boys. Plaintiff's cross-petition was dismissed as to past maintenance and future support. It is from this decree that said cause comes to this court for review.

We have carefully examined the evidence in this case with regard to whether or not the plaintiff is or is not a proper person to have the care and custody of the three minor children of said parties, and we find that there is much evidence received which is hearsay and cannot be of benefit in the determination of the case.

The evidence discloses that the defendant deserted the plaintiff when the youngest child was about two months old and took up with his present wife, and that she was no doubt the cause of the separation and the divorce action. For years the defendant failed and neglected to support his children until the death of a daughter in 1930. During this period his children needed his financial assistance very much.

There is much in the record regarding the death of the oldest child, Bernice, most of which is incompetent. The evidence discloses that at the time of the death of Bernice Gross she was at the head of her class and well respected in the community. There is much testimony received in regard to the plaintiff taking her children several times to Mexicali, a city 25 miles from Brawley, California, the home of the plaintiff. The trips to Mexicali were few, of short duration, and if they had a tendency to reduce plaintiff's children morally should have been avoided; but this, taken into consideration with all the other evidence in the case, was not sufficient to justify the taking of plaintiff's children from her.

The evidence in this case discloses that the plaintiff is a hard-working woman, who has not been able to provide and care for her children as she would like, but she has done the best she could. She sought employment outside the home to earn additional money to care for her family. We do not find that the best interests of the three surviving children require that they be taken from their mother, but rather that they remain with her until the further order of the court. The custody of minor children awarded their mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree, unless it is shown that the mother is an unfit person to have their custody, or that their best interest require such action.

We find that if the plaintiff had had the financial assistance of the father, she could have better cared for her children, and that such financial assistance would have avoided most of the ills about which the defendant complains; that the defendant has been able and should have contributed to the support and maintenance of his children; that he is now able to contribute and should contribute the sum of $25 a month for their support.

It is urged by the appellant that the trial court erred in dismissing her claim against the appellee and father of her four children for the fair and reasonable value of their support from November 1, 1923, to April 1, 1930. The trial court was not in error in finding that the evidence

was not sufficient to support a finding in favor of the appellant upon this claim.

For the reasons above mentioned, it is ordered that the decree heretofore entered, modifying the original decree, be reversed and set aside and the original reinstated, and that a further decree be entered requiring the defendant to pay the plaintiff $25 a month for the support of these children until the further order of the court; first payment due when the mandate is filed in the district court; that the part of the decree dismissing the plaintiff's claim for past maintenance of her children be affirmed. The appellant is allowed an additional sum of $250 as attorney's fees in this court. The judgment is reversed and the cause remanded, with directions to enter a decree in conformity to this opinion.

REVERSED.

FRED CHAPPELL, APPELLANT, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLEE.

FILED NOVEMBER 20, 1931. No. 27932.

Master and Servant: ASSUMPTION OF RISKS. "As a general rule an employer owes no duty to warn an employee of mature age of the extent of his lifting ability, and one who attempts to perform a task of this nature, requiring exertion beyond his physical strength, assumes the risk of injury therefrom." *Culver v. Union P. R. Co.*, 112 Neb. 441.

APPEAL from the district court for Douglas county: FRED A. WRIGHT, JUDGE. *Affirmed.*

O'Brien & Powers and *John A. McKenzie*, for appellant.

Wymer Dressler, Robert D. Neely and *Hugo J. Lutz, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and REDICK, District Judge.

PER CURIAM.

This is an action brought to recover damages for personal injuries sustained because of the alleged negligence

of the defendant railroad company. Plaintiff claims to have been injured while engaged in loading old steel rails on a flat car. The negligence alleged and relied upon is the claimed failure of the employer to provide a sufficient number of competent employees to perform the work, in reasonable safety, in which plaintiff was then engaged. Plaintiff, at the time the alleged injuries were said to have been sustained, was a man, mature and experienced at hard labor. He had previously been employed in railroad work, though never in the capacity in which he claims the injuries sued for were sustained. His evidence is to the effect that on or about the 18th of October, 1929, he and the party of which he was a member were engaged in loading old rails on a flat car; that after somewhat more than three hours of labor plaintiff and those cooperating with him, in loading this car, had received a rail from the employees who were transferring the old rails from a pile near the track to the flat car on which they were being loaded; that plaintiff, together with his fellow workmen, employing tongs, had carried this rail over to the proper place where it was to be piled upon this flat car, and while bending over it to "set it down" plaintiff experienced what he then described to the fellow workmen as a "kink in his back;" that immediately preceding this there had been no untoward incident affecting plaintiff or his fellow workmen, nor had there been any unexpected movement of the burden then in process of transportation. No complaint or notice was given by the plaintiff to the defendant company for more than six months after this incident.

At the close of all the evidence the district court, on motion of the defendant, directed a verdict against the plaintiff, from which he prosecutes this appeal.

We find that no error was committed by this action of the district judge. The facts in this case, as disclosed by the plaintiff's evidence, bring it squarely within the doctrine announced in *Culver v. Union P. R. Co.*, 112 Neb. 441: "As a general rule an employer owes no duty to warn an employee of mature age of the extent of his lifting ability, and one who attempts to perform a task of this

nature, requiring exertion beyond his physical strength, assumes the risk of injury therefrom." See, also, *Baker v. Sterrett Operating Service*, 40 Fed. (2d) 790; *Schweig v. Chicago, M. & St. P. R. Co.*, 216 Fed. 750.

It follows that the judgment of the district court is correct, and it is

AFFIRMED.

WENCEL H. KIRCHMAN V. STATE OF NEBRASKA.

FILED NOVEMBER 20, 1931. NO. 27940.

1. **Criminal Law:** CHANGE OF VENUE. "A motion for a change of venue in a criminal prosecution is addressed to the sound discretion of the trial court, and unless there has been an abuse thereof, its ruling on the motion cannot be disturbed." *Goldsberry v. State*, 66 Neb. 312.
2. **Evidence** examined and *held* sufficient to support the verdict.

ERROR to the district court for Saunders county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

O'Sullivan & Southard and *Harlan A. Bryant*, for plaintiff in error.

C. A. Sorensen, Attorney General, and *George W. Ayres, contra.*

Heard before GOSS, C. J., ROSE, DEAN, EBERLY, DAY and PAINE, JJ.

GOSS, C. J.

This defendant, tried separately, was charged jointly with Frank J. Kirchman, with making use of a bank to defraud. The indictment had four counts. During the trial the court dismissed the last two counts. The jury found defendant guilty on the first two counts. He was sentenced on each count to ten years' imprisonment and to pay a fine of $1,500, the sentences to run concurrently.

The indictment was drawn under section 8-165, Comp. St. 1929, and is referable to that clause denouncing any officer or agent of any bank "who makes use of the bank

in any manner with intent in either case to injure or defraud the bank or any individual person, company or corporation."

The defendant, Wencel H. Kirchman, was cashier, and Frank J. Kirchman was president, of the Nebraska State Savings Bank and of the Saunders County National Bank, operated at Wahoo. Count one charged intent to defraud the savings bank and Esther Anderson, and count two charged intent to defraud said "banking corporations" and Selma Edoff, in both counts, by use of the savings bank and in a manner fully set forth in the indictment. Briefly stated, funds of these parties having been invested in a certain mortgage loan taken in the name of the savings bank, it was charged that defendants, as officers of the savings bank, assigned the bonds and mortgages to the national bank and later sold and assigned these instruments to the First National Bank of Lincoln, an innocent purchaser.

The first error assigned and relied on is that the court overruled defendant's application for a change of venue to some adjoining county. The defendant filed affidavits of 67 persons, residing in various precincts, reciting that Wencel H. Kirchman has been made defendant in 13 criminal cases instituted in the county, growing out of bank failures in six banks named and known as the chain of Kirchman banks, with deposits of over $3,000,000 at the time they were closed; that there were many prosecutions of others arising out of these failures; that there had been much discussion among the people generally and a great amount of news items and editorial comment in prominent newspapers in the county; that the affiants know there is a very bitter feeling and strong prejudice against the defendant in every part of the country, by reason of which he cannot have a fair trial in the county. These affidavits, each about five pages of typed matter, seem to be identical except that blank spaces were left so as to vary the name, residence and length thereof, of the individual signer. In addition thereto the showing indicates matter published in various papers in the county. The showing of the state,

in resistance, contains 157 affidavits attempting to disclose the other side of the shield and indicating the belief that citizens eligible to jury service in the communities in which the respective affiants live are good, fair-minded, upright citizens, well disposed toward justice and to a fair and impartial trial; and that the affiants believe there is no appreciable feeling, if any, against defendant. These affidavits are likewise almost identical in language.

Under the Constitution, defendant was guaranteed a fair trial by an impartial jury. Whether such a jury was obtainable in the jurisdiction must, of course, first be decided by the trial court. It is the rule that "A motion for a change of venue in a criminal prosecution is addressed to the sound discretion of the trial court, and unless there has been an abuse thereof, its ruling on the motion cannot be disturbed." *Goldsberry v. State,* 66 Neb. 312; *Sweet v. State,* 75 Neb. 263; *Clarence v. State,* 89 Neb. 762; *Lucas v. State,* 75 Neb. 11.

The basic question to be passed on by the jury in this case was very simple. It did not depend on the wrecking of any bank or banks. It was whether the defendant used the bank to defraud these women out of their mortgage and notes secured thereby. There is nothing in the general banking situation in Saunders county, as shown by the record, indicating with legal certainty that it made a fair jury unobtainable. The answers of the jury upon their *voir dire* examination do not show on their face any bias or prejudice of the jurors chosen. Only 23 were examined as prospective jurors. Out of the 12 selected none had lost money in bank failures. The trial judge observed these jurors and heard their examination. We find in the record no cause for concluding that he abused his discretion. The ruling refusing a change of venue will not be disturbed.

Defendant filed a motion to quash the indictment and, when it was overruled, filed a demurrer based on the same points, which was likewise overruled. We have carefully examined the indictment. Without taking space to analyze the allegations, suffice it to say the first count is thoroughly good as against these legal attacks; while the second count

contains an erroneous date of a certain assignment of the mortgage—which date was correctly stated in the first count—and charges an intent to defraud the banks as well as Mrs. Edoff, we think that, even if these were material, the defendant has not been prejudiced by failure to sustain the motion or demurrer as to the second count. For the evidence as to the correct date was properly received in proof of the first count; the Edoff note and the Anderson note were secured by the same mortgage; and the sentence on the second count was made to run concurrently with that on the first count. Evidence received on the second count was not prejudicial to defendant on the first count. The defendant can serve in the penitentiary only once by reason of the conviction under this indictment.

Defendant argues that the evidence was insufficient. He was administrator of the estate of Carl J. Edoff from his appointment in 1922 until its settlement in the spring of 1927. On May 2, 1927, he paid Selma Edoff, the widow, $5,718.55, and Esther Anderson, the daughter, $1,906.20, pursuant to the decree of distribution. They separately deposited these amounts in the Saunders County National Bank and requested defendant to negotiate loans for their money on farm lands near Mead, where they lived. On September 10, 1927, $1,500 of Esther Anderson's money and $4,000 of Selma Edoff's money was loaned to Otto B. Tegelberg and Janet M. Tegelberg on a mortgage on their farm, securing two notes or coupon bonds for the above amounts. The notes and mortgage ran in favor of the Nebraska State Savings Bank. Neither the mortgage nor the notes were ever assigned to the true owners. When they were informed that their money was loaned on this security they asked for the papers. Defendant told them they were the owners of the bonds but that the bank would keep the papers for them. The notes and mortgage were not turned over to them. As the interest coupons became due the interest was paid by the mortgagors to the bank and each of the owners received her interest until the banks closed. Under date of September 10, 1927, defendant gave them receipts generally describing the loans and reciting

that the mortgage and securities were "held by this bank in trust for the benefit" of the respective owner. He executed this receipt in the name of the Saunders County National Bank, by himself personally. On October 2, 1929, the Nebraska State Savings Bank, without authority from or knowledge of the real owners, assigned the Tegelberg mortgage to Saunders County National Bank. Defendant, as cashier of the savings bank, joined in the execution of the instrument and acknowledged it as such officer. Fifteen days later the national bank duly assigned this mortgage and others (totaling $24,000) to the First National Bank of Lincoln. Defendant, as cashier of the grantor, joined in the execution of the instrument, and duly acknowledged it. The two notes for $1,500 and $4,000 were assigned in blank by the savings bank by Frank J. Kirchman, president. They were negotiable by delivery and went to the First National Bank as an innocent purchaser and holder for value, when they were delivered with the assigned mortgage. The two banks have been closed. The trusts in favor of Esther Anderson and Selma Edoff were violated. They have been defrauded out of their money. The defendant made use of the savings bank at the time he joined in the assignment of the mortgage to the national bank and when the notes were transferred to it. The court (among other elements) strongly instructed the jury that the state must have proved by the evidence beyond a reasonable doubt that the defendant had "the intent wilfully, knowingly, unlawfully, fraudulently and feloniously to injure and defraud." Applicable to defendant's testimony that he merely joined in the executive act of the assignment of the mortgage at the request of Frank J. Kirchman and did not know the import of his signature and acknowledgment, the trial court further instructed the jury that they must acquit the defendant unless they found from the evidence that, when he signed the assignment, and when the transfer of the bonds was made to the Saunders County National Bank, he "wilfully did the same, knowing that said mortgage and bonds at the time were the property of Selma Edoff and Esther Anderson or either of them."

The issues were those of fact for the jury. The evidence was amply sufficient to support the verdict.

Some other assignments relate to instructions. We have considered them and find there was no prejudicial error. To discuss them would be of no value to the parties and would unduly extend this opinion.

The judgment of the district court is.

AFFIRMED.

OMAHA ROAD EQUIPMENT COMPANY, APPELLANT, V. THURSTON COUNTY, APPELLEE.

FILED NOVEMBER 20, 1931. No. 27825.

1. **Judgment**: RES JUDICATA. To come within the rule of *res judicata*, it must appear that the same facts were or, in the exercise of due diligence, might have been presented or litigated in a former action, but where the court held that it was without jurisdiction to hear and determine certain facts in the former action the rule does not apply.
2. **Counties and County Officers**: CONTRACT IN ANTICIPATION OF LEVY. "It is not unlawful for a county board, after estimate made and prior to its meeting as a board of equalization, to anticipate the levy for the current year, and contract an indebtedness upon a particular fund within the estimate, although there is at the time no money in the treasury to the credit of such fund for the payment of the indebtedness, if in contracting such indebtedness the board remain within the limits prescribed by the Constitution and the statutes." *Austin Mfg. Co. v. Brown County*, 65 Neb. 60.
3. ———: CONTRACT: IRREGULARITY. A county is liable for the reasonable value of road machinery which it purchases, retains and uses, provided such county was clothed with power to purchase such machinery, notwithstanding the fact that the contract of purchase is unenforceable because the power was irregularly exercised.

APPEAL from the district court for Thurston county: MARK J. RYAN, JUDGE. *Reversed, with directions.*

Andrew M. Morrissey and *Arthur F. Mullen*, for appellant.

Robert G. Fuhrman and *Harold R. Jordan, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

DEAN, J.

From an order of the Thurston county board of commissioners disallowing a claim of the Omaha Road Equipment Company, in the sum of $11,838.50, for road machinery alleged to have been furnished and delivered to the county, the plaintiff company appealed to the district court. Upon submission the court found generally in favor of the county and against the company and decreed that the evidence was insufficient to prove that the company had offered to accept a return of the money and equipment and take back the machinery alleged to have been sold to the county. The court also found that section 1040, Comp. St. 1922, now section 26-734, Comp. St. 1929, does not contravene any constitutional limitations placed upon the legislature, nor does the act limit the jurisdiction of the courts in the premises. From the judgment so rendered the plaintiff company has appealed.

The record discloses that the following machinery was delivered by the plaintiff company to Thurston county, namely, on or about March 28, 1927, one caterpillar 60 tractor engine, designated P. A. 1206, valued at $5,000; one caterpillar 60 tractor engine, designated P. A. 1651, valued at $5,000; and, on or about August 9, 1927, one caterpillar 60 tractor engine, designated P. A. 2007, and also valued at $5,000; and, on or about May 16, 1927, one Russell elevator grader, valued at $1,840. Upon all of the above machinery the freight charges were paid by the plaintiff. The value of the property so delivered to the defendant county totals the sum of $17,438.50, and it is conceded that the county has made the following payments to the plaintiff upon the machinery, namely: Three old tractor engines, valued at $1,800, were accepted in trade; two county warrants, each in the sum of $1,250; a county warrant for $600; and another county warrant for $700, making a total sum of $5,600 which was paid by the defendant to apply on the machinery so delivered by the

plaintiff. And the company contends that a balance of $11,838.50 remains unpaid.

It appears that the defendant county has retained the machinery so delivered by the plaintiff and that such machinery has been used by the county in working on the public roads therein. In respect of the machinery sold by the plaintiff and purchased by the defendant, the president of the company testified that he "offered them (the county commissioners) any kind of a proposition to get" a return of the machinery, but that the county refused to make such return to the company. The president also testified that his company received no commission or profit whatsoever, arising from the sale of the machinery to the county, but that the machinery was sold to the county at the regular established factory list price.

The contention of the county is that the facts and the parties in the present action are identical with those in a former action wherein the action was dismissed, and that the judgment dismissing the action is a bar to the present action. But we do not agree with this contention. In the judgment entered in the former action, the court found that only $3,031.50 of the aggregate amount sought had then been presented to the county board and by the board disallowed, and the court held that it was without jurisdiction to hear and determine the amount due, if any, in excess of the $3,031.50, above named. We think that, to come within the rule of *res judicata,* it must appear that the same facts were or, in due diligence, might have been presented or litigated in the former action, but where, as in the present case, the court held that it was without jurisdiction to hear and determine certain facts the rule does not apply.

The county contends that at the time the road machinery was delivered the amount of money on hand in the county treasury was less than the amount due on the machinery and that the annual estimate and appropriation of the board for the year 1927 was insufficient to pay for the material. The county also contends that the contracts under which the machinery is alleged to have been pur-

chased are void from the fact that such action is an apparent attempt to bind the county to the payment of instalments out of future levies and that the orders for the machinery were the acts of individual members of the board and not that of county commissioners as such officials.

We think the county had authority to enter into the contracts for the purchase of the machinery here in question. As noted above, the machinery was purchased on or about the following dates, namely, March 28, May 16, and August 9, 1927. From the record it appears that, on or about January 6, 1927, before the purchase of the machinery, an estimate of expenses for the year 1927 was made by the board of county commissioners. Among the items listed in the minutes of the above meeting are estimates for "Supplies, $8,000," "Bridges, $40,000," "Commissioner Districts, $12,000," and "Road Districts, $12,000." And from the minutes of a subsequent meeting held July 5, 1927, it is disclosed that the following levies, among others, were made by the board, namely, "General Fund, $28,785.90," "Bridge Fund, $16,192.63," "Commissioner Districts, $8,096.32," and "Road District Funds, $8,096.32." No express provision is contained in the statute designating from what funds certain amounts as in the present case shall be paid. And we have held: "It is not unlawful for a county board, after estimate made and prior to its meeting as a board of equalization, to anticipate the levy for the current year, and contract an indebtedness upon a particular fund within the estimate, although there is at the time no money in the treasury to the credit of such fund for the payment of the indebtedness, if in contracting such indebtedness the board remain within the limits prescribed by the Constitution and the statutes." *Austin Mfg. Co. v. Brown County*, 65 Neb. 60.

In *Argenti v. City of San Francisco*, 16 Cal. 255, it is held that where a "plaintiff, in making the improvements, relied on the validity of the contracts and the obligation of the city to pay, as therein provided; the city authorities were fully informed of these facts, took no steps to repudiate the contracts, or to inform plaintiff as to her disposition

to pay: Held, that plaintiff can recover on the contracts, although there is no evidence that the officer signing them was expressly authorized; that the silence of the city authorities, under the circumstances, was equivalent to a direct sanction of the acts of such officer, and estops the city from denying his authority; that the city having acquiesced in the contracts from the commencement to the completion of the improvements, never questioning the validity of the contracts until she had received all the benefit to be had from their performance, it would be a fraud on plaintiff to permit her now to repudiate them."

And in *International Harvester Co. v. Searcy County*, 136 Ark. 209, the court, in commenting on a section of the statute there, holding that the county court had no power to let a contract to construct a bridge without an appropriation having been made therefor, made this observation: "If that was all there was in the present case, the judgment disallowing the claim would be right, because the contract for the purchase of the machinery was made by the county judge before an appropriation therefor was made by the levying court. After the appropriation for the road machinery was made the county retained the machinery and continued to use it. The county could not keep the machinery and use it for the benefit of the public and still defeat the claim for its purchase price."

In *Brown v. City of Atchison*, 39 Kan. 37, wherein a contract and certain bonds were held to be void, it was nevertheless held that the city must account for all benefits received and for which no equivalent had been rendered, "and this as nearly in accordance with the contract as the law and equity will permit."

To substantially the same effect is *Scott County v. Advance-Rumely Thresher Co.*, 288 Fed. 739, wherein the court likewise held that where certain road machinery was purchased without an appropriation having been made therefor, but where the county nevertheless used such machinery for a period of four years, such county "cannot escape liability therefor on the plea that the contract was made without authority." And it has been held that "Con-

tracts formally executed by the proper officers of the city by authority of its council, and not necessarily beyond the scope of its powers, will, in the absence of proof to the contrary, be presumed to have been made by lawful authority." *City of Lincoln v. Sun Vapor Street-Light Co.*, 59 Fed. 756.

In the present case the county is liable for the reasonable value of the road machinery which it purchased, retained, and used, where the county was clothed with power to purchase such machinery, notwithstanding the fact that the contract of purchase is unenforceable because the power was irregularly exercised. We think the county, in view of the facts, is estopped to deny liability in respect of the purchase of the machinery. Other assignments of alleged error have been urged in the brief of plaintiff; but, in view of our conclusion, we do not find it necessary to discuss them.

The judgment is reversed, with directions to enter a judgment in favor of the plaintiff in conformity with the views set forth herein.

REVERSED.

OCCIDENTAL BUILDING & LOAN ASSOCIATION, APPELLEE, V. EUGENE BEAL ET AL., APPELLANTS.

FILED NOVEMBER 20, 1931. No. 27961.

Mortgages: FORECLOSURE: SALE: CONFIRMATION. There are no restrictions upon the means by which the trial court may satisfy itself that a fair price was obtained at a foreclosure sale or that a subsequent sale would not realize a greater amount. The burden is upon the appellants to show affirmatively that the judgment of the trial court is erroneous.

APPEAL from the district court for Keith county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Halligan, Beatty, Halligan & Maupin, for appellants.

L. A. DeVoe and *T. F. Wiles, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and REDICK, District Judge.

PAINE, J.

The Occidental Building & Loan Association, plaintiff and appellee, filed its petition on April 9, 1928, for the foreclosure of a mortgage on certain town lots in Ogallala, Keith county, Nebraska. On May 17, 1929, a decree of foreclosure was entered, finding the amount due the plaintiff $3,159.98, with 10 per cent. interest. A stay of nine months was granted, and on June 17, 1930, the Occidental Building & Loan Association bid in the property for $3,550. Objections to the confirmation of the sale were heard on October 13, 1930, and the sale was set aside for the reason that the property did not sell for a fair value under all the conditions, and a new sale was had November 18, 1930, at which the appellee raised its former bid to $3,700.

Objections to the confirmation of this second sale were based principally upon the ground that the property did not sell for its fair and reasonable value under the circumstances and conditions, and also that if it was again offered for sale it would bring a larger amount. On February 4, 1931, a hearing was had and the objections were overruled, and the court, being satisfied with the legality of the sale, confirmed the same and directed that the sheriff execute a deed therefor to the appellee.

It is contended by the appellants that there was an abuse of judicial discretion, which deprived the appellants of their property without due process of law, and the only case cited in support thereof is *Lindberg v. Tolle,* 121 Neb. 25, but in the text of that case we find this statement:

"Under our statute the trial court passes on the regularity of foreclosure sales and the proceedings leading thereto. There are no restrictions upon the means by which that court may be satisfied that the land brought its fair value. No fraud is alleged in this case."

The court in this case considered the evidence in the form of exhibits and affidavits and the oral evidence in court, and before the court confirmed this sale it must have been satisfied that, under all the conditions existing in Ogallala at the time, the property brought the best price that was obtainable, or that a subsequent sale would not

bring a better price. Comp. St. 1929, sec. 20-1531. Two sales were held, at each of which the plaintiff was compelled to bid in this property. Several years had passed from the time of the filing of the petition for foreclosure until the final confirmation, and this court is of the opinion that no new question is presented in the transcript or bill of exceptions submitted in this case. *Wilson v. Wilson,* 94 Neb. 192; *McDonald v. Lessmann,* 113 Neb. 274; *In re Estate of Landon,* 98 Neb. 706; *Kearney Land & Investment Co. v. Aspinwall,* 45 Neb. 601.

The judgment of the district court is therefore affirmed, with leave to redeem before the mandate is issued.

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, APPELLEE, V. AMERICAN STATE BANK, APPELLEE: WILLIAM E. FRANK, APPELLANT.

FILED NOVEMBER 24, 1931. No. 27944.

APPEAL from the district court for Scotts Bluff county: EDWARD F. CARTER, JUDGE. *Affirmed.*

Wright & Wright, for appellant.

I. D. Beynon and *Mothersead & York, contra.*

Heard before ROSE, GOOD, DAY and PAINE, JJ., and BEGLEY, District Judge.

PER CURIAM.

At the public sale of the American State Bank building in Scottsbluff, Nebraska, a bid of $7,625 was made, objections made thereto by a depositor, and the district court on the day fixed for confirmation directed that a resale be held then and there in open court, whereupon a new bid of $9,000 was made for the said building, which was confirmed by the court. The original bidder filed objections to setting aside the original sale made by the receiver and the refusal of the court to confirm the same and appealed to this court for review.

The American State Bank of Scottsbluff, Nebraska, became insolvent in 1928. H. C. Peterson was duly appointed receiver and A. E. Torgeson was in active charge of the bank under the receiver. On December 11, 1930, upon application of the receiver, the district court entered an order directing the receiver to sell all of the remaining assets of said bank at public auction at the front door of said bank building on January 6, 1931, and notice was given by publication in the Star-Herald for three weeks. At the sale William E. Frank and Louise Frank, of Grand Island, Nebraska, were the highest bidders for the bank building, being lot 12, block 11, original town of Scottsbluff, together with the furniture and fixtures therein, consisting of all of the furniture in the bank at that time except the Burroughs adding machine, their bid being $7,625, and the auctioneer declared said property sold to them, subject to the confirmation of the court. On January 21 the receiver, in making his report of the sale to the Franks, set out that the sale had been fairly conducted and that in his opinion no higher bid could be obtained for the property, and January 26, 1931, was set as the date of hearing upon the objections to the confirmation of said sale. C. H. Westervelt, a depositor in said bank, objected to the sale on the ground that the property did not sell for its fair value and that more money could be obtained for the same. On January 24, 1931, Beach Coleman and three others made an offer to the district court to bid $15,500 for the bank building together with the notes and judgments owned by the bank, which latter had been sold to George A. Carpenter for the sum of $7,400, making the offer of the Coleman associates $475 in excess of the amounts bid at the sale by the Franks and Carpenter upon the two items, and said original bidders were directed by registered mail, sent under order of the district court, to appear on January 26, 1931, and show cause why the bid of the Coleman associates should not be accepted. On the date fixed all the parties were present and the Franks moved for a confirmation of the sale to them. At said time Coleman and his associates offered to raise their bid upon the two items to $16,000, but refused

to bid separately upon the two items. Evidence was taken and said C. H. Westervelt, when asked about the statement made by the auctioneer at the public sale, answered: "Why he made the statement that these bids would be registered and if any one wished to raise the bid they could do so with the district judge any time before confirmation. These bids were all registered; he never announced the sale or any bid; it was all registered bids."

William E. Frank, J. L. Moore, George A. Carpenter, and Herb Moore testified for the appellant that they had not heard statements made at the sale that higher bids could be made before confirmation. It is not denied that the statement was made that the bids taken at the sale were subject to the approval and confirmation by the court, and the court ordered that a resale be then and there held in court, at which time all former bidders were present in court and represented by counsel; the said Torgeson, as assistant to the receiver, reopened the sale, and J. E. Scott bid for the two items $18,201, which was an excess of $3,176 over the original bid for the building and furniture made by the Franks in the sum of $7,625, together with the bid of $7,400 made by Carpenter for the notes and judgments, which made a total of $15,025 for the first two separate bids, the high bid upon the banking house and furniture and fixtures being in the amount of $9,000. The court thereupon declared all of said items were sold to J. E. Scott for the sum of $18,201, and the court upon motion ratified and confirmed said sale. Upon said William E. Frank announcing his intention in open court to appeal from the order refusing to confirm his bid, it was ordered by the court that, upon payment of $9,201 to the receiver, assignment be made to J. E. Scott of all notes, claims and judgments, and that the said J. E. Scott be directed to pay to the receiver the sum of $1,350, or 15 per cent. upon his bid of $9,000 upon the banking house and fixtures, and that the same be held by the receiver to insure the compliance with the bid of J. E. Scott therefor, and that upon the termination of the appeal of the Franks the residue of the purchase price shall be at once due and payable. Cost bond

in the sum of $100 having been filed by the said Franks, said order of confirmation of the district court was brought to this court for review.

The appellant insists that the high bidder at a judicial sale acquires the right to have such sale confirmed, and may appeal from an order setting aside this sale, and gives as his authority *Penn Mutual Life Ins. Co. v. Creighton Theatre Building Co.*, 51 Neb. 659, which holds that an order of the district court setting aside such a sale and ordering a resale is a final order affecting a substantial right of the purchaser, from which he may appeal. This case clearly sustains the right of the appellant to bring the case to this court, and in several cases it has been held that a judicial sale will not be set aside on account of mere inadequacy of price unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake or to shock the conscience of the court. *First Nat. Bank v. Hunt*, 101 Neb. 743; *Frederick v. Gehling*, 92 Neb. 204; *Lindberg v. Tolle*, 121 Neb. 25. In the latter case it was said: "Under our statute the trial court passes on the regularity of foreclosure sales and the proceedings leading thereto. There are no restrictions upon the means by which that court may be satisfied that the land brought its fair value."

In the sale of the assets of a failed bank, it is the duty of the receiver and of the district judge who passes upon the acts and doings of the receiver to exhaust their best efforts in securing the highest price possible for the assets of a failed bank, to the end that the depositors may secure the largest percentage possible on their deposits. It is argued that the court cannot refuse to confirm a sale made by a receiver except for fraud, mistake, collusion, or gross inadequacy of consideration, so gross as to shock the conscience of the court, and several Nebraska cases are cited in support thereof. It is also advanced in support of the position of the appellant that judicial sales lose their value and the ardor of bidders will be dampened if bidders feel that the high bid is to be considered but an offer, and that

receivers will continue after said sale to secure new bidders who will raise the bid made at the public sale.

We call attention to the case of *Saunders v. Stults*, 189 Ia. 1090, which was the sale of land at receiver's sale, and in the text we find this statement, which is very much to the point: "The appellants' contention overlooks material facts; that is, that the receiver was simply the officer or agent of the court; that this sale was not a completed sale; that it was not in the power of the receiver to make a completed sale which would bind the court to its confirmation; and that those who buy at a receiver's sale, such as we have in this case, take with knowledge of the fact that the contract of sale is not binding on the receiver until the same is presented to the court and approved by the court; that a sale such as we have here is a sale without the right of redemption." See *State Bank v. Green*, 11 Neb. 303.

In the case of *State v. Farmers & Merchants Bank*, 114 Neb. 378, this court said: "The receiver is at all times an officer of the court, subject to its orders and directions, an agent, the scope of whose authority is limited by law. *State v. Bank of Hemingford*, 58 Neb. 818; 23 Cyc. 1065. Thus every one dealing with such receiver knows of the limitations, or lack of limitations, to his power to transact the business of the institution. He cannot without the approval of the court relinquish any of the rights of the trust."

In the case at bar, an offer of $7,625 had been made, and this was raised in open court at the time of confirmation to $9,000, which meant an additional sum of $1,375 could be secured for the benefit of the depositors in this bank. The high bidder at such a sale acquires certain rights which must be protected, and he is entitled to a confirmation of the sale if there is no good reason why it should not be confirmed, and the court is faced with the equities due to the one who has made this high bid on the one hand and with the rights of the depositors and the obligations of the officers in charge of the affairs of the bank on the other hand, and this court holds that the district judge, when all the parties were before him in open court, and when it was evident that more money could be received for the

depositors, acted within his rights in refusing to confirm the high bid made some days before at the public sale and in confirming the higher bid received in open court for this bank property, and the action of the district court is in all things

AFFIRMED.

ELMER DOHLIN ET AL., APPELLANTS, V. DWELLING HOUSE MUTUAL INSURANCE COMPANY, APPELLEE.

FILED NOVEMBER 24, 1931. No. 27966.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Max V. Beghtol, Glen H. Foe and *James L. Rankin,* for appellants.

George E. Hager and *Perry W. Morton, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and REDICK, District Judge.

PER CURIAM.

Elmer Dohlin and Mrs. Ellen McKinney brought suit in the district court for Lancaster county against the Dwelling House Mutual Insurance Company of Lincoln to recover on an alleged oral agreement to renew certain insurance policies upon which there was a loss. After the plaintiff's evidence was taken, the district judge directed a verdict for the defendant.

The plaintiff, Elmer Dohlin, carried fire insurance in the defendant company upon a dwelling and flour and feed building and contents, located in Palmer, Nebraska, which insurance expired in March, 1930. The plaintiff, Elmer Dohlin, claims that he applied to E. E. Johnson, a soliciting agent of defendant company, residing at St. Paul, Nebraska, to renew said insurance, which is absolutely denied by said agent. Upon April 3, 1930, the dwelling and flour and feed building were destroyed by fire. Notice of said loss was given to the said E. E. Johnson and to the de-

fendant company, but no part of said loss has been paid. The other plaintiff was named in the mortgage clause which had been attached, making the insurance in case of loss payable to her.

The defendant admitted that E. E. Johnson was its authorized agent and had solicited and received applications for insurance upon the frame building and the hatchery and the contents of the flour and feed building, which insurance was issued but had expired prior to the date of the loss in question, and that said insurance was not renewed, and that no policies of insurance were outstanding on the date of the fire and that defendant was not liable for the loss that occurred.

The evidence discloses that a special agent of said company examined the property insured in March and advised the company not to renew the policies as the risk was undesirable. The agent, Johnson, testified that he had been working for the defendant company for some ten years, and that during that time he had solicited and received applications for insurance, which he sent in to the company, and all policies of insurance were written by the company in Lincoln, and usually returned to him, and he delivered them and collected the premium. He testified positively that after delivering the policies and collecting the premiums thereon, which policies had expired prior to the fire, that he had never again talked with Mr. Dohlin regarding insurance until after the fire, and that Mr. Dohlin had never told him that he wanted the policies renewed; while, on the other hand, Mrs. Ellen McKinney testified that when Mr. Johnson was there he stated in her presence: "I always take care of renewals, unless otherwise ordered I will take care of your renewal."

In January of 1930, Mr. Dohlin wrote Johnson a letter in regard to a slight change in the tenancy of the building, which letter was forwarded to the defendant company at Lincoln and an answer made by Frank Mills, secretary, in which he uses this language: "Replying to the letter from Mr. Elmer Dohlin, regarding the change in occupancy

of the old restaurant building, that will not make any difference in the insurance, and when we renew these policies in March we will make the change accordingly."

It is contended by the appellant that this was a promise to renew these policies over the signature of the secretary of the company, but the statement, "when" we renew these policies, may mean "if" we renew these policies, or "provided" we renew these policies. *Van Brunt & Wilkins Mfg. Co. v. Kinney,* 51 Minn. 337; *State v. Huston,* 21 Okla. 782; *Atlantic Coast Line R. Co. v. Jones,* 132 Ga. 189.

The contention of the appellants that the agent, Johnson, promised to renew the policies when they expired would not necessarily bind the defendant company, for "where the agent of an insurance company undertakes to act for and on behalf of the assured, as to such acts, he is to be regarded as the agent of the assured and not of the company." *Parker v. Knights Templars & Masons Life Indemnity Co.,* 70 Neb. 268.

All parties knew that the policies must be written in the home office at Lincoln, and that Johnson, the agent, had no apparent authority and was not authorized to make a contract of renewal of the policies upon said property. *Bridges v. St. Paul Fire & Marine Ins. Co.,* 102 Neb. 316.

There was no policy of insurance in force with the defendant company at the time of the fire. Such policies expire according to their terms, and the district court was right in sustaining the appellee's motion for a directed verdict in this case, and the judgment of the district court was right and is

AFFIRMED.

HATTIE STUMPFF V. STATE OF NEBRASKA.

FILED NOVEMBER 24, 1931. No. 28032.

ERROR to the district court for Merrick county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

J. H. Grosvenor and *Garlow & Long,* for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

PER CURIAM.

In this case Hattie Stumpff, plaintiff in error, was convicted of unlawful and felonious possession of intoxicating liquors "on or about the 3d day of January, 1931." In this error proceeding she presents to this court six questions, all of which, in view of the evidence before us, we answer in the affirmative.

We are convinced that the verdict of guilty returned by the jury in the instant case, in view of this record, may not be adversely affected by a verdict in a distinct and separate trial finding plaintiff in error's husband, Alfred William Stumpff, guilty of illegal possession of the "same intoxicating liquors," though such verdict be wholly based "on the identical evidence" on which Mrs. Stumpff was found guilty in the instant case. Nor can we admit the contention on behalf of Mrs. Stumpff that the fact that the premises on which the liquors were found at the time of the commission of the offense were the homestead of herself and her husband, Alfred William Stumpff, and in which both were then residing, requires the acquittal of Mrs. Stumpff of the charge of which she was convicted.

To the contrary, it is admitted that the legal title to the real estate comprising this homestead was, at all times, in Mrs. Stumpff. It is undenied that on the 3d day of January, 1931, the date of the alleged offense, just prior to the service of the search warrant embracing this home in its description, two persons had been served with intoxicating liquor in this house, and had paid for the same. Mrs. Stumpff, plaintiff in error, was present at this transaction. True, the persons thus served with liquor "do not remember" whether they were served this time by the husband or the wife. It is unquestioned in the record, however, that they laid 35 cents on the table for some one for what

they then received. There is evidence in the record that in the previous October, and within the period of the statute of limitations, one of these witnesses had purchased similar liquor from plaintiff in error and paid her for it. It also appears that when the officers entered this home on the 3d day of January, in serving the search warrant, Mrs. Stumpff was just inside the door near where they entered, and from this place "she went back in the room toward the closet or sink;" and at this time she picked up a jug containing intoxicating liquor. It was then taken away from her by the officers. Without quoting the evidence further at length, it may be said that, while her counsel now contends this act of actual possession of the liquor was wholly due to the excitement of the occasion, still the evidence is such that we cannot say, as a reviewing court, that the jury were not justified in the conclusion of fact that it was an attempt made by Mrs. Stumpff to assist her husband in his illegal business, and for that purpose make away with incriminating evidence. In this light Mrs. Stumpff's act would amount to a plain attempt to aid and conceal the illegal possession of her husband, if we accept the contention of Mrs. Stumpff to be true that it was her husband's liquor and not her own. However, the finding of intoxicating liquor on the premises owned by her created the presumption of unlawful possession. This is not changed or obviated by the fact that husband and wife are occupying the same house. *Grosh v. State,* 118 Neb. 517.

Even if we accept plaintiff in error's contention that the intoxicating liquors, which were discovered by the sheriff and his posse situated in her house on the 3d day of January, 1931, were wholly the property of her husband, still we are confronted by the fact that the inference is fully sustained by the record that on the day in question she was not only present and had full knowledge of the situation, but was actively aiding and abetting her husband in maintaining and concealing said illegal possession, especially from the officers who made the search of the premises. If this be true, then it would seem that she was

squarely within the provisions of section 28-201, Comp. St. 1929, which reads as follows: "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." *Jahnke v. State*, 68 Neb. 154; *Dixon v. State*, 46 Neb. 298; *Williams v. State*, 91 Neb. 605. This statute applies to felonies created by subsequent legislation. *Lamb v. State*, 69 Neb. 212. Under the present statute above quoted the information in the instant case embraces and includes the view of the facts here suggested. *Scharman v. State*, 115 Neb. 109; *In re Resler*, 115 Neb. 335; *State v. Girt*, 115 Neb. 833. It would seem that in every aspect of the evidence before us it amply supports the verdict of the jury and the sentence of the court in the instant case.

We have also carefully examined the objections of plaintiff in error to the competency of the district judge who presided at the trial and find them wholly devoid of merit. The trial, verdict and sentence being in conformity with law, the conviction is in all things

AFFIRMED.

JOHN CHERPINSKY ET AL. V. STATE OF NEBRASKA.

FILED NOVEMBER 24, 1931. NO. 28073.

1. **Robbery**: PROOF. The offense of robbery from the person may be established by testimony of one credible witness, if believed by the jury.
2. ———: "ROBBERY FROM THE PERSON." To constitute the crime of robbery from the person, it is not essential that the money or property be actually taken from the person of the victim. It is sufficient in that respect if it be taken from his personal presence or personal protection by force or by putting him in fear.

ERROR to the district court for Madison county: CHARLES H. STEWART, JUDGE. *Affirmed.*

H. F. Barnhart and *Bernard A. Brown*, for plaintiffs in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

PER CURIAM.

Plaintiffs in error, hereinafter called defendants, were convicted of the offense of robbery from the person, and were sentenced to imprisonment in the state penitentiary for a term of 23 years. Defendants bring to this court for review the record of their conviction.

Defendants contend that the evidence is insufficient to sustain the verdict, on the ground that they were not sufficiently identified as the perpetrators of the robbery. The following pertinent facts are established:

August Tews was the assistant manager of Paramount Publix Corporation and, as such, was a custodian of money and property of the corporation to the extent of $1,232.55, which funds were kept by him in a safe in a building in Norfolk, Nebraska. In the forenoon of the day of the robbery, the janitor of the building was attacked by two men, bound with wire, forced to go into the room in which the safe was situated, and a rain coat was thrown over his head. Shortly thereafter Mr. Tews arrived. He was also attacked and forced, at the point of pistols, held by each of the men, to enter the same room, open the safe, take therefrom the said funds, and hand them over to the robbers. The janitor testified that defendants were the persons who committed the robbery. There was other evidence to the effect that he had stated to other persons, outside of court, that he was unable to identify defendants, or was uncertain as to whether they were the persons. However, Mr. Tews was positive in his testimony and identified defendants as the robbers.

The question was one of fact for the determination of the jury. The positive testimony of one credible witness, identifying defendant as the perpetrator of a crime of this character, is sufficient, if believed, to support a conviction. *Schultz v. State,* 88 Neb. 613; *Buckley v. State,* 79 Neb. 86. The evidence was sufficient, if believed by the jury, to establish the identity of the defendants as the perpetrators of the crime.

It is contended that the verdict is contrary to law, in that it was not supported by testimony that the money was taken directly from the person of Mr. Tews. It is not essential to a conviction for robbery that the money or property be actually taken from the person of the victim of the robbery. It is sufficient in that respect if it be taken from his personal presence or personal protection by force or by putting him in fear. *Hill v. State,* 42 Neb. 503; *People v. Covelesky,* 217 Mich. 90.

In 23 R. C. L. 1142, sec. 7, it is said: "It is often stated that an essential and distinguishing characteristic of robbery is the fact that the felonious taking must be from the person of another, but, by the great weight of authority, the words 'taking from the person of another,' as used in connection with the common-law definition of robbery, are not restricted in application to those cases in which the property taken is in actual contact with the person of the one from whom it is taken, but include within their meaning the taking by violence or intimidation from the person wronged, in his presence, of property which either belongs to him or which is under his personal protection and control. And where such words have been incorporated into statutes defining robbery, they have received the same construction. In this connection the preposition 'from' does not convey the idea of contact or propinquity of the person and property. It does not imply that the property is in the actual or immediate presence of the person. The thought of the statute, as expressed in the language, is that the property must be so in the possession or under the control of the individual robbed that violence or putting in fear was the means used by the robber to take it. If it is away from the owner, yet under his control, for instance in another room of the house, or in another building on his property, it is nevertheless in his personal possession; and, if he is deprived thereof, it may well be said it is taken from his person. Goods are called personal property in the law, and presumed to accompany the person. If taken from the owner, this relation of owner

and property is sundered, and the goods are separated from the person, and this essential element of the offense is established."

In 54 C. J. 1015, it is said: "At common law it is not necessary that the property should be taken from the physical person of the victim, the requirement that it be taken from his 'person' being satisfied if it is taken from his 'presence.'

"The requirement of a taking from the person is satisfied by a taking from the presence under statutes defining robbery as a felonious and forcible taking from the 'person.' * * * It is not necessary that the property taken should have been in actual contact with the person of the victim."

In the present case, the money was actually taken from the person of Mr. Tews. By violence and threats he was forced to open the safe, to take therefrom, with his own hands, the money, and to hand it to defendants, or put it in an open receptacle in defendants' possession. The evidence is sufficient to show that the crime, as charged, was actually committed by the defendants.

It is further argued that the sentence is excessive, and this court is asked to reduce it in the event that a new trial is not granted. The statute provides a maximum penalty of 50 years for the offense. It is a well-known fact that criminals, engaged in committing crimes of this character, are potential murderers. Defendants were armed with deadly weapons, prepared to use and doubtless would have used them, had it been necessary to carry out their evil designs. No mitigating circumstances are shown. One of the defendants had been previously convicted of a felony. While the sentence is severe, the offense was one demanding severity of punishment. Under the facts disclosed, we are unable to say that the sentence imposed is excessive.

No error has been found in the record. The judgment is

AFFIRMED.

ISABELLA SCHMIDT ET AL., APPELLEES, V. SALINE COUNTY, APPELLANT.

FILED NOVEMBER 24, 1931. NO. 27928.

1. Taxation: REALTY: VALUATION: NET INCOME. The net income derivable from real estate, prudently used for the purpose for which it is best adapted, is a proper factor to consider in determining its actual value.
2. ———: TANGIBLE PROPERTY. While, under the statute, all tangible property should be assessed at its actual value for the purpose of taxation, if assessed at less than actual value, then all should be assessed at the same proportion of actual value.

APPEAL from the district court for Saline county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

John E. Mekota and *Thomas J. Dredla*, for appellant.

F. L. Bollen, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

GOOD, J.

This appeal involves the assessed valuation for taxation of certain lands in Saline county. Plaintiffs, who are the owners of 18 tracts of land situate in school district No. 68, in Saline county, complained to the board of equalization that their lands were assessed 20 to 25 per cent. higher than other lands of the same value, and higher than the lands, of like value, generally in the county and state. The board of equalization denied relief. Plaintiffs appealed to the district court, and that court reduced the assessment of plaintiffs' lands to the extent of 15 per cent. The county of Saline has appealed.

Upon a careful examination of the entire record, it clearly appears that plaintiffs' lands are not assessed for more than their actual value. It further appears that the lands in Saline county and in the state generally are assessed at not more than 70 per cent. of their actual value, and that the lands of plaintiffs are assessed at a greater proportion of their actual value than other lands in Saline county and in the state.

It was formerly the rule in this court that one could not complain that his lands were assessed too high, unless assessed at more than their actual value, and that he could not have his assessment reduced because other lands generally were assessed at less than their actual value. It was held that his only relief was to complain of the properties that were assessed too low. *Lincoln Telephone & Telegraph Co. v. Johnson County*, 102 Neb. 254; *Sioux City Bridge Co. v. Dakota County*, 105 Neb. 843. The latter case was taken to the United States supreme court on writ of certiorari and the judgment of this court there reviewed, wherein the holdings of this court were reversed (*Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 67 L. Ed. 340), following which this court overruled its former decisions and now holds that one whose property is assessed at less than its actual value may complain if it is assessed at a higher proportion of its actual value than other property in the state. *Sioux City Bridge Co. v. Dakota County*, 110 Neb. 597.

The principal controversy here is with reference to the cause which affects the value of plaintiffs' lands. It appears that for many years school district No. 68, in Saline county, has levied a tax, for school purposes, running from 14 to 17 mills annually on the dollar of assessed valuation, and that a like levy will be necessary and will continue in said district for years to come. It also appears that the tax levy for school purposes on lands of the same character and quality, situate outside of and adjacent to the district, is from 4 to 5 mills on the dollar of assessed valuation. This has resulted in imposing a tax on an average quarter section of land within district No. 68, for several years last past, of about $350 per annum, while on a quarter section of land of the same quality and character, lying adjacent to but outside the district, the tax is about $175 per annum. This situation has caused a decrease in the actual value of the lands within the district, for sale and loan purposes, of 20 to 25 per cent.

It is earnestly and strenuously contended by the defend-

ant county that the question of school taxes cannot be taken into consideration in fixing the value of the lands; that the value of lands within the district, of the same quality and character as those immediately without and adjacent thereto, should be assessed on the same basis. We cannot agree with this contention.

Section 1, art. VIII of the state Constitution, is in part as follows: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises." It will thus be seen that taxes must be uniformly and proportionately levied upon property on the basis of valuation.

Section 77-201, Comp. St. 1929, provides: "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade." Pursuant to this statute, all tangible property should be assessed at its actual value for purposes of taxation, but, if tangible property is generally assessed at less than its actual value, then all of it should be assessed at the same proportion of its actual value.

In 26 R. C. L. 365, sec. 322, it is said: "By fair market value is meant the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the property is adapted and might in reason be applied."

It is urged by defendant county that the value of the land should be determined by the fact that the land within the district will produce as much in crops as land of the same character without the district. This, however, calls for the application of the gross income principle in determining the value. The better rule and the one generally recognized is: "If the property is devoted to the use for which it was designed, and is in a condition to produce

its maximum income, one very important element for ascertaining its present value is the net profits derived therefrom." 26 R. C. L. 367, sec. 324. See, also, note to *Wells Fargo & Co. v. Johnson*, L. R. A. 1916C, 529, 532; 3 Cooley, Taxation (4th ed.) 2308, sec. 1146.

In *Railroad & Telephone Cos. v. Board of Equalizers*, 85 Fed. 302, it was held, in effect, that, under a constitutional provision requiring that all property shall be taxed according to its value, the earnings of railroad and telephone companies may be considered in determining the value of the property for purposes of taxation, but earnings of such companies furnished a safe basis on which to estimate values only when net earnings are considered. Gross receipts do not constitute a proper basis for determining the value of such companies.

The same principle is applicable to real estate prudently used for the purpose to which it is best suited and adapted. The lands in question are agricultural and are used for that purpose. The net income which they will produce to the owner is a factor in determining their actual or market value. The fact that a tract of land is subjected to an annual burden of $350 for taxation, while another tract, of like character and quality, lying adjacent thereto, is subjected to an annual burden of but $175 for taxation, has a tendency to, and no doubt does, affect the respective market or actual value of the two tracts. The one having the greater burden produces the smaller net income and, naturally, would be of less market value. Since taxes must be levied according to actual value, the taxing authorities are only concerned in determining what the actual value is, regardless of the causes which produce it, and to see that taxes are levied proportionately, according to the actual value, on all property.

The record justifies the reduction made by the district court in the assessment of plaintiffs' lands, and the judgment is

AFFIRMED.

EBERLY, DAY, and PAINE, JJ., dissent.

PAINE, J., dissenting.

I desire to state the reason for my dissent from the opinion of the majority of this court.

The appellees are the owners of 18 parcels of farm land within the school district of Friend, Nebraska, also known as school district No. 68. The school levy in this district during the past few years, of 14 to 15 mills, required to pay for the excellent schools in that school district, is very much higher than the 4 or 5 mills levied upon adjoining farm land by rural school districts. It is contended that the owners of this farm property derive no benefit from the superior school advantages afforded in this school district. Yet, a school district has the right to fix the levy of taxes for school purposes upon all the property within its boundaries. And it may be granted that for such taxes it may render little or no return to the owners of this rural property, upon the same principle that every citizen is required to pay school taxes upon his property to the same extent, whether he has children attending school or not. 26 R. C. L. 38, sec. 23.

The assessing authorities are required to make valuation once in four years of all real estate as of April 1 (Comp. St. 1929, sec. 77-1601) and such authorities can have no information at that time of the amount of tax which will later be levied for a particular school district. It will be supposed that the taxes of the previous year have all been paid prior to the first Monday in June, when the county board meets as a board of equalization to equalize valuations as of April 1 preceding. The relief demanded by the appellees, i.e., that the valuation upon their farms be reduced 20 to 25 per cent. because of their school taxes, in effect asks the county board of equalization to reduce the valuation of their lands as of the date of April 1 because of the fact that the necessary school taxes of district No. 68, which are certified to the county clerk on or before the first Monday in July (Comp. St. 1929, sec. 77-1803) will show that a levy of 14 to 15 mills will be required for that year, and no one can know what the school levy may be for the following three years of the valuation period.

Upon a hearing before the county board of equalization, the appellees were refused relief upon July 14, 1930, and the valuation of their farm lands was not reduced because it happened to be located in the school district of the city of Friend and thus subjected to high taxes for school purposes.

It may be presumed the appellees demand this relief upon the theory that such school district taxes constitute, in effect, an incumbrance which diminishes the actual sale value of their lands, yet the law has been definite that no owner is allowed to deduct any incumbrance from the value of his real property except such as may be allowed by statute, and by special enactment, section 77-1502, Comp. St. 1929, it is provided that the value of outstanding real estate mortgages shall be deducted and paid by the mortgagee, but I can find no mention in the statute of allowing a deduction because the school taxes in a certain district are continuously higher than in an adjoining district.

If the school tax burden upon real estate in this district is so heavy as to decrease its sale value, can this not be easily remedied by having the officers of this district adopt more economical plans for the administration and conduct of their public schools, rather than to reduce the valuation of this farm land 15 per cent., thus cutting down the state and county taxes paid thereon? If farm property lying within this school district is to have its valuation reduced, why should not town property similarly affected be likewise reduced? Is this to be a precedent for reducing values in all highly taxed school districts in this state?

The Constitution, art. VIII, sec. 1, says that state taxes shall be levied by valuation uniformly and proportionately upon all tangible property. Does this opinion not violate this provision as to farm lands within and without this district, and release the farm land within the district from paying its proportionate share of state taxes by this reduction of 15 per cent. of its valuation?

A case not directly in point, but bearing thereon, is *Donovan v. City of Haverhill*, 247 Mass. 69, in which it

was held that the fact that long-term leases carry rent which reduce the market value of the property below what it would be in their absence does not prevent the assessment of the property for taxation at its full value, as compared with other property in the neighborhood, or what it would be if free from the leases.

In the opinion of Chief Justice Taft in *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 28 A. L. R. 979, he says, toward the close of the opinion, that there must be something which, in effect, amounts to an intentional violation of the essential principles of practical uniformity. If the farm property in this district is fairly and uniformly taxed, the mere fact that adjoining farm property lies in rural districts which do not care to maintain expensive schools does not violate Judge Taft's pronouncement.

In the recent decision of this court in *Meridian Highway Bridge Co. v. Cedar County*, 117 Neb. 214, this court, speaking through Chief Justice Goss, said: "We are loath to interfere with the sound discretion reposed in boards of equalization to value real property at its actual value. Where the action of such a board does not appear to have been exercised arbitrarily nor to have omitted to take into consideration the proper and necessary elements to be considered in fixing the value, its action ought not to be disturbed. Here the valuation might have been rather high for the particular year, and yet we do not feel disposed to find, on what evidence was submitted to us, that it was. We think the proper rule is that the sound discretion reposed in the board of equalization to hear complaints and determine on the valuation of property will not be disturbed by this court, unless so manifestly wrong that reasonable minds cannot differ thereon."

It is suggested that the county board of equalization of Saline county gave every phase of this question the most careful consideration, and that its action in this matter should not be disturbed.

VIVIAN I. MAYFIELD ET AL., APPELLEES, V. NORTH RIVER INSURANCE COMPANY, APPELLANT.

FILED NOVEMBER 24, 1931. No. 27899.

1. Insurance: FORM OF POLICY: STATUTE. The adoption of our insurance code of 1913 (Comp. St. 1929, ch. 44) evidences the legislative intent that the provisions of the New York standard form of fire insurance, as then existing and as then construed by the courts of that state, should be adopted as the basis of the Nebraska insurance contract, expressly subject, however, to all other provisions contained in such insurance code which are inconsistent with or modify the provisions of such New York standard form.
2. ———: POLICY. By construction section 44-322, Comp. St. 1929, is to be regarded, in legal effect, incorporated in and forming a part of the policy in suit.
3. ———: ———: BREACH. Under the statutes of Nebraska, the violation of the conditions or the breach of the warranty in a fire insurance policy expressed in the words, "while located and contained as described herein, * * * and not elsewhere," by the removal of the property insured from the place described in the policy, does not invalidate the insurance contract, unless such breach of contract contributed to the loss. Comp. St. 1929, sec. 44-322.

APPEAL from the district court for Richardson county: ELWOOD B. CHAPPELL, JUDGE. *Affirmed.*

Montgomery, Hall, Young & Johnsen, for appellant.

F. A. Hebenstreit and *J. C. Mullen, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and BLACKLEDGE, District Judge.

EBERLY, J.

This is an action at law on a policy of fire insurance. It was concededly issued by the appellant, hereinafter designated as defendant, to the appellees, hereinafter referred to as the plaintiffs, doing business as a partnership under the name and style of Richardson County Hatchery. Its terms insured the copartners "against all direct loss or damage by fire, * * * to an amount not exceeding Fifteen Hundred ($1,500) Dollars (for a definite period), to the

following described property while located and contained as described herein, and not elsewhere, to wit: $1,500 on stock of merchandise * * * all only while contained in the one-story, metal roof, ironclad building, occupied as a Hatchery and Poultry Supply Store, situated on lots 23 and 24, block 90, of Falls City, State of Nebraska."

It was alleged in plaintiffs' petition that on or about the 1st day of July, 1929, the plaintiffs removed the stock insured from the location as above described to a building located on lot 12, block 221, Falls City, "with the full knowledge, oral authority and consent of the defendant company by and through its agent, C. A. Johnson, and at which place" the property covered was thereafter totally destroyed by fire.

The defendant company's answer contained, first, a general denial; second, admitted the execution of the policy of insurance in suit; quoted the language of the description hereinbefore set forth; denied the authority of its agent to waive any provision of the policy except in writing; and further alleged that the fire involved in this action was "not at the location covered by the policy, and defendant is not liable for any loss which may have resulted therefrom."

To this the plaintiffs filed a reply which, in addition to a denial of the new matter contained in the answer, set forth additional facts which they allege amounted to an estoppel.

By agreement a jury was waived and the case was tried to the court, which resulted in findings and judgment for the plaintiffs as prayed. From an order overruling defendant's motion for a new trial this appeal is prosecuted.

Defendant in this court challenges the sufficiency of the evidence, and alleges that the district court erred "in failing to hold, as a matter of law, that the policy provision (heretofore quoted) constituted a coverage condition or risk limitation, which, in the absence of an express consent equivalent to the making of a new contract, covered the property only at the location described in the policy."

From the foregoing it is evident that the determining words in this controversy are, "the following described property while located and contained as described herein, and not elsewhere, to wit:" and, "all only while contained in." Considered without reference to context, these provisions constitute an essential part of, and are identified with, the New York standard fire insurance policy form. Of this policy form this court has said: It is "a definite and well-known form of contract. Its characteristics, terms and conditions are known and recognized by the legislature of New York and other states, and are familiar to all carrying on the business of fire insurance." *State v. Howard,* 96 Neb. 278, 287.

It may be said in addition that this standard form, first enacted substantially by the legislature of New York in 1886, has, with passing time, received a definite and settled judicial construction by the courts of New York. This is especially true as to the controlling words hereinbefore quoted. Thus in 1894 we find the following language employed in *Bahr v. National Fire Ins. Co.,* 80 Hun (N. Y.) 309: "The action was to recover $200, the insurance on a carriage * * * 'while located and contained as described herein, and not elsewhere, to wit: * * * while contained in the frame building (here follows the precise description).' The carriage was burned in a livery stable and horse shoeing shop, * * * a block and a half away from the place named in the policy. This judgment cannot stand. The location of the insured property was a warranty, a breach of which avoided the policy. *Bryce v. Lorillard Fire Ins. Co.,* 55 N. Y. 240." This construction has continued unchanged to the present time. In *American Surety Co. v. Patriotic Assurance Co.,* 242 N. Y. 54, 63 (January, 1926), we find the New York court of appeals adhering to the view thus expressed, and employing the following language: "The provisions of the New York standard fire insurance policy of which we may take judicial notice provide that the insurer insures against damage by fire to the property described in the policy 'while located and con-

tained as described herein * * * but not elsewhere.' The description is a warranty, the truth of which is a condition precedent to any liability on the part of the insurer. *Bryce v. Lorillard Fire Ins. Co.*, 55 N. Y. 240; *Bahr v. National Fire Ins. Co.*, 80 Hun, 309; *London Assurance Corporation v. Thompson*, 170 N. Y. 94."

Thus, it must be conceded that under the terms of the New York standard fire insurance policy form, as construed by the courts of that state, unmodified by legislation, the controlling words of this policy in suit must be deemed a warranty, the truth of which at the time of this loss is a condition precedent to recovery thereon.

It would appear, however, that the legal effect of the language quoted, assuming its character as a warranty in the technical sense of that term to be unquestioned, has been in legal effect modified by Nebraska legislation. In 1913 the legislature of that year adopted an insurance code which appears as chapter 154, Laws 1913. It was approved April 18, 1913. It was passed for the purpose of providing "for the organization and government of insurance companies and to regulate, supervise and control the business of insurance in Nebraska," etc. The provisions of this enactment with amendments thereto are now carried as chapter 44, Comp. St. 1929. This legislation provided in part: "No fire insurance company shall issue any fire insurance policy covering any property or interest therein in this state other than on a form prescribed by the department of trade and commerce as nearly as practicable in the form known as the New York standard as now or may be hereafter constituted, except as follows." Comp. St. 1929, sec. 44-601. The proper construction of this insurance code was determined by this tribunal in the case of *State v. Howard*, 96 Neb. 278. In that opinion it was expressly determined that "that portion of the section referred to which provides that the New York form shall be used as it 'may be hereafter constituted' is invalid;" but "that it was the intention of the legislature that the New York form should be adopted as the basis of the in-

surance contract, and that the words 'as nearly as practicable' should be construed to mean 'as nearly as practicable' considering all other provisions contained in the insurance code which are inconsistent with or modify the provisions of the New York standard form."

In this connection it is also to be noted that on this subject, and with special reference to section 44-601, Comp. St. 1929, this insurance code expressly provides: "A policy issued in violation of this article shall be held valid, but shall be construed as provided herein, and when any provision in such a policy is in conflict with any provision hereof, the rights, duties and obligations of the company, policy holder and the beneficiary shall be governed by the provisions of this article." Comp. St. 1929, sec. 44-608. It was also determined in the case last cited that, in the preparation of a form as required by such section 44-601, the duties enjoined thereby on the department of trade and commerce were "ministerial or administrative, and not legislative, and the section imposing the duty is not an unconstitutional delegation of legislative power."

The New York standard form of fire insurance at the time of the adoption of the Nebraska insurance code existed solely by virtue of a New York statute. The adoption of the New York form as the basis of the Nebraska insurance contract was in effect the adoption of the New York enactment. This situation renders proper and requires the application of the rule of construction that, where the legislature adopts the statute of another state, judicial construction which it has already received in such state is also adopted. *Coffield v. State,* 44 Neb. 417; *White v. State,* 28 Neb. 341; *Forrester v. Kearney Nat. Bank,* 49 Neb. 655; *Goble v. Simeral,* 67 Neb. 276; *Gentry v. Bearss,* 82 Neb. 787; *State v. Martin,* 87 Neb. 529. The authorities above enumerated support the view that this court is committed to the doctrine that the rule of construction applied in the cases referred to is proper to be applied in the interpretation of the controlling provision of the policy in suit, which we have already quoted, excepting only where such pro-

visions in the policy are necessarily repugnant to the insurance code provision enacted for the purpose of modifying the provisions of the New York standard insurance form. It necessarily follows that the language of the policy in suit, including the words which are quoted at the commencement of this opinion and on which the defendant bases his defense, must be construed as a technical warranty and given the same effect as accorded by the courts of New York, except in so far as such construction may not be in harmony with other provisions of our insurance code "which are inconsistent with or modify the provisions of the New York standard form." *State v. Howard*, 96 Neb. 278. In this connection section 44-322, Comp. St. 1929, becomes important. It reads as follows: "No oral or written misrepresentation or warranty made in the negotiation for a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty deceived the company to its injury. The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding." In the interpretation of the statutory provision just quoted this court in *Security State Bank v. Aetna Ins. Co.*, 106 Neb. 126, by Rose, J., said: "These provisions are by construction a part of the policy. * * * The legislation must be considered as a whole. To the enactment in the first sentence on the subjects of misrepresentation and warranty in preliminary negotiations, the second sentence adds a provision on the existence of breach of condition in the policy itself. The statute declares that the breach of a condition in the policy shall not avoid it, 'nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss.' "

In *Westchester Fire Ins. Co. v. Norfolk Building & Loan*

Ass'n, 14 Fed. (2d) 524, the circuit court of appeals of the eighth circuit, in construing the statutory provision now under consideration, employed this language: "This provision of the Compiled Statutes of Nebraska constitutes a part of the insurance contract. *Home Fire Ins. Co. v. Weed*, 55 Neb. 146; *Calnon v. Fidelity-Phenix Fire Ins. Co.*, 114 Neb. 194; *McPhee v. Millers' Nat. Ins. Co.*, 198 Mich. 215. There is no evidence in the record tending to show that any purported change in title by reason of the foreclosure proceedings contributed in any way to the loss, and it has been held by the supreme court of Nebraska in construing the uniform Nebraska fire insurance policy that a breach of conditions in a fire insurance policy does not invalidate the insurance policy unless the breach of conditions contributed to the loss. *Security State Bank v. Aetna Ins. Co.*, 106 Neb. 126. This construction of a Nebraska statute by the highest court of the state is binding upon the federal court."

So by this rule of construction section 44-322, Comp. St. 1929, is to be regarded as, in legal effect, incorporated in and forming a part of the policy in suit. We therefore still regard the words of the policy in suit, upon which the defendant bases its defense, as in the nature of technical warranties as denominated by the courts of New York. Even so, they must be deemed modified as to force and effect by the statutory proviso providing that breach thereof "shall not avoid the policy * * * unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding." It is to be noted also that the existence of the breach of warranty at the time of the loss and its contribution to the loss must concur or coexist as a prerequisite to avoiding the policy. This conclusion the Nebraska cases fully sustain.

Indeed, while the facts which were involved did not present the precise question for determination here, nor was the language of the policy in suit identical with the policy now before us, still in view of section 44-608, Comp. St.

1929, the words of the fourth paragraph of the syllabus in *Hannah v. American Live Stock Ins. Co.*, 111 Neb. 660, express the exact principle controlling in the instant case, and, as a precedent, is binding on this court. In the case last referred to this court, in a unanimous opinion, construing what now appears in the Compiled Statutes of 1929 as section 44-322, announced the unanimous conclusion of the court that, "Under the statutes of Nebraska, the violation of a condition in a policy of insurance on live stock, by the removal of insured chattels from premises of owner, does not invalidate the insurance, unless such breach of contract shall exist at the time of the loss and contribute to the loss."

As to waiver and estoppel, on which plaintiffs in part rely, the evidence in the record, if believed, establishes that, after the removal of the insured stock from the place described in the policy to the place where it was subsequently destroyed by fire, the local recording agent of defendant was in and through the entire building in which this stock was then contained, saw and inspected the building, and had personal knowledge of the removal of the stock; that he was expressly informed by plaintiffs that the entire insured stock had been removed from the old location to the new one; and also that negotiations were had with him based on the fact that upon the arrival of certain newly purchased property additional insurance would be wanted by plaintiffs in the new location. It may fairly be said that, assuming the evidence in behalf of the plaintiffs to be true, this agent of the defendant, long prior to the fire, knew or should have known that the assured had not only removed their stock from the old to the new location, but were proceeding on the belief, engendered by transactions had with such agent, that the insurance had been likewise transferred and covered the stock in the new location. At this point we do not overlook the defendant's contention that no legal waiver or transfer of insurance under the terms of the policy were effectual until indorsed in writing upon the same. Nevertheless this court is committed to the doctrine that notice to a local agent of insurer who has

authority to issue the policy is notice to the insurer. *Hunt v. State Ins. Co.*, 66 Neb. 125; *Echols v. Mutual Life Ins. Co.*, 106 Neb. 409; *Arendt v. North American Life Ins. Co.*, 107 Neb. 716; *Cooper v. German-American Ins. Co.*, 96 Minn. 81; *Cummings v. National Fire Ins. Co.*, 251 Mich. 105. The defendant, therefore, was chargeable with the knowledge possessed by its agent of the real situation with reference to the risk prior to the fire that destroyed the property in question. So, too, the business of insurance was and is "public in character, and requires that all those having to do with it shall at all times be actuated by good faith in everything pertaining thereto; shall abstain from deceptive or misleading practices, and shall keep, observe and practice the principles of law and equity in all matters pertaining to such business." Comp. St. 1929, sec. 44-101. But whether the facts established by the evidence are sufficient to show a legal waiver or binding estoppel we need not determine. It must be conceded that the record as an entirety fails to establish that the removal of the stock from the old to the new location, of which the insurer had imputed knowledge long prior to its destruction, in any manner contributed to the loss. This, in view of the express terms of the statute, is vital.

It follows that the judgment of the district court is correct, and it is

AFFIRMED.

ANTON A. TRESNAK, APPELLANT, V. JOHN J. PAULSEN ET AL., APPELLEES.

FILED NOVEMBER 24, 1931. No. 27950.

1. Payment: APPLICATION: ESTOPPEL. Where a debtor, with knowledge that certain payments were credited on his chattel mortgage debt and not on real estate mortgage instalments owed by him, accepts the benefits of these credits over a period of years, renews his chattel mortgage, less the credits, and, with knowledge for several years that amortization assignments were being taken for liens upon his real estate for said payments, makes no complaint or objection until the creditor has sold and

transferred his chattel mortgage debt, as so reduced, and parted with all security he had given therefor, *held*, that said debtor has ratified said transaction and is estopped to deny the propriety of the application of his payments and to deny the validity of the creditor's liens on his real estate for the real estate mortgage instalments.

2. ———: ———. Where payment made has been credited to a particular note, and that note subsequently renewed by a payer in reduced amount, payer cannot subsequently insist that payment was applied contrary to his directions.

APPEAL from the district court for Wayne county: DE WITT C. CHASE, JUDGE. *Reversed, with directions.*

Fay H. Pollock, for appellant.

Davis, Hendrickson & Davis and *John Gross, contra.*

Heard before ROSE, GOOD, DAY and PAINE, JJ., and BEGLEY, District Judge.

BEGLEY, District Judge.

Action to foreclose seven assignments of interest amortization instalments on a mortgage held by the Federal Land Bank of Omaha, Nebraska, and assigned to the Surety National Farm Loan Association, and by it in turn assigned to the Dodge Agricultural Credit Association, which association claimed the right to these amortization instalments by subrogation.

Defendant, John J. Paulsen, and wife, mortgagees, filed an answer and allege that they furnished the money by which these amortization interest instalments were made and that same should not have been assigned and denied right of subrogation. The reply was a plea of ratification. The trial court dismissed plaintiff's petition and the plaintiff has appealed.

The evidence discloses that defendant, John J. Paulsen, prior to December 5, 1923, was the owner of 232 acres of land in Wayne county, Nebraska, and negotiated a Federal Land Bank mortgage loan thereon of $19,000; same being an amortized loan upon which semiannual instalments of $617.50 became due on February 1 and August 1 of each

year, commencing August 1, 1924. These instalments included interest and a payment upon the principal. At the time of securing this mortgage loan, the First National Bank of Wayne held a first mortgage lien on the premises for the sum of $9,500, but released its lien and refiled same to permit the Federal Land Bank loan to become a first lien. The First National Bank of Wayne, by cross-petition, asked a foreclosure of its lien, which was granted by the trial court and same held to be a first lien on the premises.

After the commencement of this suit the Dodge Agricultural Credit Association was declared a bankrupt and Anton A. Tresnak, trustee, was substituted as plaintiff.

Under the Federal Farm Loan Act, the Federal Land Bank is impowered to make first farm loan mortgages through Farm Loan Associations, organized thereunder, and this loan was negotiated through the Surety National Farm Loan Association, and said association in writing guaranteed the payment of the note both as to principal and interest. Under the law, these associations cannot make second or third farm loan mortgages or chattel mortgage loans, but such loans can be made by Agricultural Credit Associations, provided for in the Federal Farm Loan Act. The same set of officers and directors which represented the Surety National Farm Loan Association organized the Dodge Agricultural Credit Association as a separate corporation entity to care for this class of loans.

At the time of making the Federal Land Bank mortgage, Paulsen needed additional funds, and borrowed from the Dodge Agricultural Credit Association approximately $5,500, giving his note and chattel mortgage security therefor. He afterwards renewed his chattel mortgage and notes, and from time to time borrowed other money, giving notes and mortgages therefor in different amounts. Paulsen made his payments in rather irregular amounts to John H. Roper, who was managing officer of both last two named associations. Roper credited the amounts paid to the indebtedness of the Dodge Agricultural Credit Association and mailed a check from the Surety National

Farm Loan Association to the Federal Land Bank in payment of the instalments due on the Paulsen mortgage in accordance with its guarantee, and took back from the Federal Land Bank these amortization assignments to said association for the same, and same were duly recorded against Paulsen's land. Paulsen had knowledge of these transactions and in writing authorized the assignment to be made to the Dodge Agricultural Credit Association for the payments of August 1, 1925, and February 1, 1926. In 1927 the Surety National Farm Loan Association in writing assigned four of these assignments, then held by it, to the Dodge Agricultural Credit Association, which gave Paulsen credit for the same on his chattel indebtedness and returned to him his notes and chattels of that value. Paulsen accepted such credits upon his notes and chattels and gave a renewal note for the increased amount. Thereafter the Dodge Agricultural Credit Association for a valuable consideration sold and transferred Paulsen's said indebtedness to the West Point National Bank, which now holds the same. Thereafter the Dodge Agricultural Credit Association advanced the money for payment of three more interest instalments and the same were in like manner assigned to it without any payment being made therefor by Paulsen.

Paulsen now contends that he expressly directed Roper to apply the money paid on his Federal Land Bank mortgage indebtedness and that Roper disobeyed instructions by crediting same to the chattel mortgage indebtedness. The record discloses that only on two instalments was such direction given, and these are not claimed as assignments by the plaintiff. On all the assignments that credit was given Paulsen on his chattel indebtedness, he accepted the same and has not offered to return the money thus received. Paulsen also claims that there are some dividends due him which are not accounted for, but James R. Hanson, an expert accountant, testified that he had examined the books of appellant association and that all money had been accounted for and full credit given on appellees' chattel indebtedness and that no fraud was discovered on the books of the association.

Where no direction is given by a debtor for the application of payments, a creditor may apply payments where he desires. *Lenzen v. Miller,* 53 Neb. 137. If the debtor has given specific direction as to where to apply the payments, the creditor is in duty bound to apply the payments in accordance with such direction, unless the debtor, with full knowledge of all the facts, adopts the transaction and accepts the benefits of such payment without complaining. 2 C.J. 696; 48 C.J. 654; 21 R.C.L. 89, sec. 94; *Johnston v. Milwaukee & Wyoming Investment Co.,* 49 Neb. 68.

In this case Paulsen, with knowledge that his payments were credited on his debt to the Dodge Agricultural Credit Association and not on his real estate mortgage instalments, by accepting the benefits of these credits over a period of years, renewing his chattel mortgage less the credits, with knowledge for several years that amortization instalments were being taken for liens upon his real estate, and by his acts and conduct over a period of several years without objection or complaint, until the the Dodge Agricultural Credit Association had sold his chattel mortgage as so reduced, and parted with all security he had given it, thereby acquiesced in the application of the payments and the taking of amortization liens, ratified same, and became estopped to deny the propriety of the application of his payments or to deny plaintiff's liens on his real estate for the instalments.

The appellant, by taking these assignments with the knowledge and in one instance under the express written direction of the appellee Paulsen, and allowing the credit to be made on Paulsen's chattel indebtedness, is entitled to be subrogated to the payment of said instalments and is entitled to a foreclosure of same as a first lien. The appellee, First National Bank of Wayne, having only a lien subject to the Federal Land Bank, is entitled to a second lien and cannot complain of the priority of the appellant's lien.

The decree of the district court is therefore reversed and the cause remanded, with directions to enter a decree of

foreclosure, awarding the appellant a first lien upon the premises described, as prayed for in the petition, and awarding the First National Bank of Wayne a second lien upon said premises.

REVERSED.

CLARENCE G. BLISS, RECEIVER, APPELLANT, V. PETERS NATIONAL BANK, APPELLEE.

FILED DECEMBER 11, 1931. No. 27996.

Evidence examined, and *held* to sustain the judgment of the trial court.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

I. D. Beynon, Battelle, Travis & Strehlow and *F. C. Radke,* for appellant.

Rose, Wells, Martin & Lane, contra.

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

PER CURIAM.

This action, originally instituted by the Citizens State Bank of Superior, Nebraska, against the Peters National Bank of Omaha, was based on the allegations that the latter bank, entrusted with a draft for collection on or about the 18th day of May, 1927, had wrongfuly and negligently and carelessly failed to notify the plaintiff of the nonpayment of said draft until the 3d day of June, 1927, whereby, because of such delay, the original drawers of said draft were permitted to check out their account with plaintiff, and thus prevented plaintiff from reimbursing itself for the amount theretofore advanced by plaintiff bank thereon to the drawers thereof. After the commencement of the action, the insolvency of plaintiff was judicially determined, and Clarence G. Bliss, as receiver, was substituted for it. There was a trial to the court, a jury being waived, which

resulted in a finding by the court generally in favor of defendant and against plaintiff, and specifically "no want of due diligence on part of defendant." This was followed by judgment of dismissal. From an order overruling his motion for a new trial, the receiver appeals.

This litigation arises out of a note brokerage transaction. The "Bankers Service," hereinafter referred to, is a trade name employed by one A. L. Geiselman, then engaged in dealing with negotiable instruments at Omaha. On May 17, 1927, Elliott and Myers, grain dealers at Superior, Nebraska, were desirous of obtaining a loan. Accordingly on that day they executed, as parts of a single transaction, three separate instruments in writing, viz., a promissory note in usual form, payable three months after date to A. L. Geiselman, or order; a "warehouse and grain receipt" reciting that there had been by them "received in store for A. L. Geiselman * * * twenty-five hundred bushels of No. 2 hard wheat," which instrument also contained the stipulation, "that this warehouse receipt attaches to and becomes a part of a promissory note * * * and is given as security for the attached note;" also a draft in the sum of $2,450 "for note and receipt attached, at sight pay to the order of Citizens State Bank, Superior, Nebraska," and directed to "Bankers Service, 218-222 Brandeis Theatre Building, Omaha, Nebraska, c/o Peters National Bank," as drawee. The three instruments referred to, fastened together, were by Elliott and Myers deposited "for collection" with the Superior bank. This bank indorsed the draft, and transmitted the three instruments to the Peters National Bank, with a letter of advice, which, setting forth the inclosure of the draft drawn on the Bankers Service "through you," directed that the proceeds thereof, when collected, be transmitted to the American National Bank "for our use." The evidence of the plaintiff is that the Superior bank credited Elliott and Myers' checking account, and thereafter permitted withdrawals therefrom to be made by that firm. However, it is not claimed that the Peters National Bank had any notice or knowledge of this additional

transaction. The evidence in the record on behalf of the defendant bank is that immediately on receipt of the draft they attempted to present it at the office of Mr. Geiselman, but were unable to do so because the latter "was out of town." However, immediate acknowledgment of the receipt of the draft was made to the Superior bank, and that bank notified of the absence of Mr. Geiselman, the drawee. Thereafter daily efforts were made to present the draft, which were continued without success due to the absence of the drawee. On or about the 1st day of June following, on receipt by the Superior bank of the monthly reconcilements from the American National bank, it was discovered by the Superior bank that the proceeds of the draft had not been transmitted to that institution as directed by the letter of advice.

On the 3d day of June the Superior bank telegraphed the Peters National Bank in reference thereto, and received a prompt reply that the draft was then unpaid. On June 13 the Superior bank by letter instructed the Peters National Bank: "If our collection Elliott and Myers * * * May 17th, has not been paid, present again and insist on immediate payment." On the 17th of June, at the first opportunity, the draft was presented and payment was demanded of the drawee named therein, and by him unconditionally refused. All papers were then on that day returned to the sending bank. It may fairly be said that the record before us justifies the conclusion that the warehouse receipt was fraudulent, inasmuch as it was later discovered that the grain described therein was not in storage when the receipt was issued. However, the rule applicable to the situation seems to be: "An agent to collect a debt or claim must exercise ordinary care, skill, and diligence in the performance of all the duties incident to the undertaking, and will be liable to his principal for any loss which his negligence in this respect may occasion; but if the agent has acted in good faith and with ordinary care, skill, and diligence he will not be liable, * * * nor will he be liable if the principal himself has prevented him from collecting. What

will amount to due care on the part of the agent will depend upon the nature of the undertaking and all the circumstances in the particular case, and is ordinarily a question of fact for the jury." 2 C.J. 726.

It may be suggested at this point that the Nebraska rule, in view of the facts involved in this case, is that the correspondent bank to whom the plaintiff bank transmitted the draft for collection and remittance does not become the agent of the payee thereof and thus become liable to it for negligence in making the collection. The relation of principal and agent is between the drawers of this draft and the correspondent bank, the defendant herein. *Henefin v. Live Stock Nat. Bank,* 116 Neb. 331; *First Nat. Bank of Pawnee City v. Sprague,* 34 Neb. 318.

However, waiving for the present this question, still the fact remains that, even assuming the relation of principal and agent to have existed between the plaintiff and the defendant in the instant case, there is evidence in the record which, if believed, sustains the conclusion that the defendant in this case has, in all respects, acted in good faith and with ordinary care, skill, and diligence in the transaction. It is also true that the findings and determination of the trial court, where a jury is waived, are entitled to be given the same force and effect as the verdict of a jury. It follows, therefore, that, as the controlling question of fact involved herein has been determined against the plaintiff by the trial court, such determination must be given the same force and effect as the verdict of a trial jury, and, therefore, the judgment appealed from must be, and is,

AFFIRMED.

CHARLES COCHRAN ET AL. V. STATE OF NEBRASKA.

FILED DECEMBER 11, 1931. No. 28027.

ERROR to the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

John E. Lowe, for plaintiffs in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

PER CURIAM.

The defendants were found guilty of stealing a cow. By motion to quash and by demurrer, the defendants challenged the sufficiency of the information to charge the offense. The particular criticism is that the information failed to charge a crime, in that it did not state the value of the cow. Section 28-515, Comp. St. 1929, the statute under which the information is laid, denounces "whoever steals any cow, steer, bull, heifer, or calf, of any value." Where chicken stealing was the subject-matter, under section 28-524, Comp. St. 1929, which contains the same phrase, "of any value," we held that it is not necessary to allege in the information that the stolen chickens had any value. *Halbert v. State,* 116 Neb. 1, and cases cited therein. The same principle applies here.

It is assigned as error that the evidence is insufficient to support the verdict. We have examined the evidence. It is unnecessary to detail it, but we are of the opinion that it was sufficient to submit to the jury on the state's theory of guilt and to support the verdict of the jury. While there was contradictory evidence on behalf of defendants, it was peculiarly the province of the jury and not of the court to decide the facts.

On the same day the motion for a new trial was overruled, and five days after the verdict, defendants filed an additional and supplemental motion for new trial, supported by two affidavits.

One of these affidavits was made jointly by Gladys Cochran (not described) and Gertrude Lemon (wife of a defendant). It stated that, at the noon recess before the argument ended, they saw the father of the complaining witness in conversation with one of the jurors (unnamed) in the hall of the courthouse and indicating to the juror, by

signs with his fingers, the Roman figure "V." They say "they reported the said circumstance to the attorney for the defendants as soon as they had an opportunity but which was after the submission of said cause to the jury and following the court's instructions after the jury had retired to deliberate." The father was sworn and testified, in opposition to the affidavit, that he did not know any of the jurors, and that he never talked or made signs to any one in the manner indicated. There is no rule which requires the court to believe the affidavits impeaching the verdict. *Tracey v. State,* 46 Neb. 361. Moreover, even if we believe that a juror was conversed with in the manner stated, yet the affidavit did not show diligence in bringing the alleged misconduct to the attention of the trial judge. Even defendants in criminal cases must deal fairly by the court. The matter is ruled by *Polin v. State,* 14 Neb. 540.

The other affidavit, by the defendant Cochran, charged that the juryman who was afterwards made foreman said to a fellow juryman, when the defendant Lemon took the stand (on June 11th or 12th) wearing an ill-fitting black sweater belonging to a codefendant, "I wonder where he got that sweater;" that the remark caused some others of the jury to laugh and that such ridicule was prejudicial. The foreman of the jury was sworn and denied making the above quoted remark or any similar one. He testified it was a very hot day and he said, in substance and effect, to the juror next to him that he would think it pretty hot with the sweater on. The court did not err in holding that the supplemental motion for a new trial was not grounded on facts showing prejudice of jurors or misconduct of any juror.

Other alleged errors are assigned. We find no prejudicial error committed by the trial court. For the reasons given, the judgment of the district court is

AFFIRMED.

MOSES B. TRUSSELL, APPELLEE, V. HARRY FERGUSON, APPELLANT.

FILED DECEMBER 11, 1931. No. 28014.

1. **Appeal:** INSTRUCTIONS. Refusal of requested instruction does not constitute error, where instruction given by the court on its own motion is to the same effect.
2. ———: ——: ESTOPPEL. A party who induces the trial court to give an erroneous instruction, by requesting one to the same effect, cannot predicate error thereon.
3. **Evidence:** ADMISSIBILITY. Rules and regulations made and issued by the department of public works under the authority and in accord with section 39-1416, Comp. St. 1929, are admissible, where applicable to the evidence.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Reversed.*

Good, Good & Kirkpatrick, Julius D. Cronin and *Ralph M. Kryger,* for appellant.

J. A. Donohoe and *J. J. Harrington, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

GOSS, C. J.

Plaintiff obtained a verdict and judgment for damages against defendant for personal injuries. Both parties were driving west on highway number 20 and about a mile and a quarter west of Royal in Antelope county. Plaintiff was driving a team hitched to a wagon. Back of the seat was a disk. Hitched to the wagon on the rear he had a tandem tow of two mowers he had purchased at a sale. It was about sundown. There is a conflict in the evidence as to whether it was dark enough to require lights on cars. Plaintiff had no lights on his wagon or on the mowing machines behind it. Defendant, driving an automobile west, struck the rear mower. The effect was to throw plaintiff back from his seat against the disk and to injure him. Defendant testified he was driving about 30 miles an hour; the bright lights of an east-bound car blinded him so that

he slowed down a little to get his bearings; "so I was looking at the side of the road and the center of the road, and I looked up ahead of me and suddenly there right in front of me was an object, I didn't know what it was, and I whirled to the left to avoid it, but I didn't avoid it, I was too close to it and I hit it on one wheel" (parenthetically, it should be said that defendant, on cross-examination, admitted that the car with bright lights had passed him a quarter of a mile before he struck plaintiff's rig and that he was watching another car which did not arrive until after the accident); what he first saw ahead of him, he testified, looked like a team and wagon—if it had been the team and wagon alone he would have missed it; he found out afterwards it was the rear mower he struck; and he estimated he was going between 25 and 30 miles an hour. His car was overturned and damaged.

An assignment of error is based on instruction number 10, which is as follows: "In determining whether or not the defendant was guilty of negligence in driving his car, you may consider the fact that he had liability insurance, together with all the other facts and circumstances appearing in evidence. The fact that the defendant carried liability insurance of itself is not proof of negligence on the part of the defendant."

Carrying liability insurance is generally considered prudent and farsighted. Some states have made it a part of their legislative and public policy to require it. We find ourselves unable to agree that it is a matter to be considered with other facts and circumstances to determine whether or not one driving a car is guilty of negligence. If the transcript showed that the court gave this instruction on its own motion alone and that the defendant did not induce him to give it, we would say that the first sentence, at least, was clearly erroneous.

But the defendant induced the court to give the instruction by his own instruction number 5, requested by him and refused. Defendant also assigns this refusal as error. That requested instruction reads: "You are further in-

structed that the fact that the defendant carried liability insurance of itself is not proof of negligence on the part of the defendant, and the mere fact that the defendant carries insurance alone should not be considered by yourself in arriving at your findings."

In this requested instruction, by the use of the words "of itself" in the first clause and by the use of the words "the mere fact * * * alone" in the second clause, the defendant, by implication, wished the jury to be instructed and to understand that the matter of insurance might be considered in connection with other facts and circumstances bearing on negligence. The trial court accepted defendant's view of the law on this subject and merely amplified it in the first sentence of its instruction number 10 by telling the jury that the insurance (which defendant requested the court to say could not be considered "alone") could be considered with all the other facts and circumstances appearing in evidence. Where instructions given by a court have the same effect as those refused, error does not result from the refusal. *Sonneman v. Atkinson,* 121 Neb. 752; *Payne v. Clark,* 117 Neb. 238; 14 R. C. L. 815, sec. 73. If the court erred in relation to these instructions the defendant cannot now complain. Instruction number 10 contained defendant's theory of the law as expressed and implied in his requested instruction number 5. Fairness to the trial court prevents defendant from challenging now that which he himself induced the court to do then.

Defendant assigns error because the court excluded certain official highway rules and regulations printed and issued by the department of public works. The authority for the department to make these rules was provided by the legislature in 1919. Laws 1919, ch. 190, title VII, Department of Public Works, art. II, State Highways, sec. 15. This section is now section 39-1416, Comp. St. 1929. It says: "In order to promote public safety and to preserve and protect state highways and prevent immoderate and destructive use of the same, the department of public works may formulate such rules and regulations in regard to the

use of and travel upon the state highways, not inconsistent with the provisions of this article, as said department may deem proper. Such rules and regulations shall be published and issued in pamphlet form by said department and designated as the official state highway rules and regulations of the department of public works, and shall be available upon request to the general public free of charge." The offer in evidence called especial attention to paragraphs (j) and (k) of section 13, "Driving Rules and Regulations" which read as follows:

"(j) A vehicle shall not tow more than one other vehicle and no tow connection shall exceed 16 feet in length, provided special permission may be granted by the department of public works on highway construction or for other properly regulated uses for the use of more than one trailer."

"(k) A vehicle loaded with material extending more than 5 feet beyond the rear of the vehicle shall have fastened on the rear end of the material a red flag by day and a red light by night."

These rules are reasonably adapted "to promote public safety" and we are not shown nor do we find that they are inconsistent with the provisions of the article of which section 39-1416 is a part. Plaintiff's counsel, on oral argument, stated that the printed rules applied only to motor vehicles. We do not so understand them. The department was authorized by the statute quoted to make rules "to promote public safety" upon the state highways. The printed rules apply in terms to any "vehicle," which word they expressly define (p. 4) as "Any conveyance propelled or drawn by its own or other power;" and they define a "motor vehicle" as "Any automobile, truck or motorcycle." So a motor vehicle is a vehicle, and a wagon or a mower, drawn or devised to be drawn by animals, is a vehicle within the meaning of the rule. The evidence shows that plaintiff's wagon was drawn by horses and that the tongues of his mowers were elevated so as to hitch the tows closer to the wagon. So the mowers were vehicles and were towed by a vehicle within the contemplation of the rules. We are

of the opinion that the rules were admissible and that paragraph (j) was particularly applicable to defendant's theory and should have been submitted to the jury to be considered with other evidence in determining whether plaintiff was guilty of negligence and the extent thereof. We do not discover from the evidence that paragraph (k) was applicable to it. So its exclusion was not erroneous.

Instruction number 7 was complained of on the ground that it cast the burden of proof upon defendant to prove contributory negligence of the plaintiff. The words "as a cause of action" probably limited that instruction to plaintiff's proof of defendant's negligence. However, as defendant concedes that instruction number 5 correctly states the elements plaintiff is required to prove and number 15 correctly states the rule on comparative negligence, it would have been less likely to confuse the jury if number 7 had been omitted. On a retrial this will probably be done.

Other errors are assigned, but we do not find them prejudicial and think it unnecessary to consider them in view of our decision to send the cause back for another trial.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

RAY WARNER ET AL., APPELLEES, V. FRANK W. BERGGREN ET AL., APPELLANTS.

FILED DECEMBER 11, 1931. No. 28003.

1. Waters: DRAINAGE. Owner of land on which water is impounded by natural drainage forming a lake has no right to drain the water by artificial means upon the land of another to his damage, except as provided by statute.
2. ———: ———. Evidence in this case does not bring it within the provisions of sections 31-301 and 31-302, Comp. St. 1929, for the water collecting in the basin was not drained into any natural watercourse or into any natural depression or draw draining into a natural watercourse.

APPEAL from the district court for Polk county: HARRY D. LANDIS, JUDGE. *Affirmed.*

John Tongue and *Campbell & Campbell,* for appellants.

George F. Corcoran, contra.

Heard before ROSE, GOOD, DAY and PAINE, JJ., and LESLIE, District Judge.

DAY, J.

This is a suit in equity to secure an injunction to prevent individual landowners from draining a pond or basin upon their lands in such a manner that the water runs across plaintiffs' land. From a decree granting a permanent injunction, the defendants appeal.

There is no serious dispute about the facts. There is some disagreement as to conclusions drawn therefrom, arising mostly from a confusion of terms. The defendants constructed an open ditch about 15 inches deep through the rim of the basin on their lands and discharged the water into the ditch of the highway, separating the lands of the parties, where it ran through a small culvert and thence upon the land of plaintiffs. There is a gentle slope of the land in the general direction from defendants' land toward plaintiffs' land. Surface water naturally drains into this basin and can only escape by percolation or evaporation. In exceptional cases this basin has filled and overflowed toward the plaintiffs' land. The common-law rule is that no natural easement or servitude obtains in favor of the higher land to drain surface water upon lower land. In this state the common-law rule, with some exceptions, obtains. *Muhleisen v. Krueger,* 120 Neb. 380. In many respects, the situation presented in the case at bar is similar to that in the foregoing case.

The defendants, however, claim the right to drain the basin on their lands in the manner attempted, by virtue of statutory modifications of the common-law rule. They rely upon section 31-301, Comp. St. 1929: "Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse;

and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation." Section 31-302, Comp. St. 1929, defines the terms: "Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse."

The drainage attempted by the defendants is not such as comes within the provisions of the statute. The controversial ditch was not constructed to discharge the water from the basin into either a natural watercourse, or, as contended by defendants, into a depression or draw, whereby such water might be carried into some natural watercourse. The water in this case was diverted and drained from one water shed into another by means of a ditch dug through the rim of the basin and emptied into a borrow pit by the side of the road, where it overflowed in a somewhat diffused state upon the plaintiffs' land. In the subsequent course of drainage it did not flow in any draw or natural depression, but would slowly drain into a pond upon plaintiffs' land, where artificial drainage would be necessary to carry it to a natural draw or depression. Surely, the plaintiffs cannot be required, under the statute relied upon, to construct an artificial drain to care for the water discharged upon their land by such a ditch as the one constructed by the defendants. It is not necessary to discuss those cases cited by the defendants, which are clearly within the statute, where water was certainly drained into a natural watercourse. In *Graham v. Pantel Realty Co.*, 114 Neb. 397, the court had almost the identical situation before it, and held that, where water is impounded upon land by natural conditions and a lake is formed, the owner has no lawful right to cause such water to flow upon the land of another to his damage.

In conformity to the foregoing findings of fact and conclusions of law, it is determined that the permanent injunction was properly granted, and the judgment of the trial court is

AFFIRMED.

STANDARD OIL COMPANY, APPELLANT, V. JAMES O'HARE, APPELLEE.

FILED DECEMBER 11, 1931. No. 27929.

Trespass: SUIT TO ENJOIN: PETITION: SUFFICIENCY. A petition for injunction which states facts showing possession of plaintiff and threatened continuing trespass which will result in irreparable damage, or which is destructive of the leasehold or that which gives it chief value, states an action for equitable relief, even though thereafter on an application for a temporary injunction there develops some dispute as to title.

APPEAL from the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Reversed.*

William H. Herdman and *Cook & Cook*, for appellant.

Joseph E. Daly, contra.

Heard before ROSE, GOOD, DAY and PAINE, JJ., and BEGLEY, District Judge.

BEGLEY, District Judge.

The appellant, being the plaintiff, filed its petition in the court below, praying that the appellee be enjoined from entering and trespassing on premises consisting of an oil station, during the plaintiff's lease, and from obstructing or resisting plaintiff's possession of said premises, and from interfering with or resisting plaintiff in operating its filling station, in carrying on its business on said premises. The court entered an order for a hearing on application for a temporary injunction and issued a restraining order pending said hearing. A hearing was had on the application for a temporary injunction, each party thereto filing affidavits. The appellee filed an affidavit alleging a defense to the petition, and alleging that the court had no jurisdiction of the subject-matter of the action, that the petition does not state facts sufficient to constitute a cause of action, and that the appellant has an adequate remedy at law. The court on the hearing denied a temporary injunction and considered the affidavit of the appellee as containing a demurrer and dismissed the petition of

the appellant on the ground that appellant had an adequate remedy at law.

The sole question for determination is the sufficiency of the petition to state a cause of action for equitable relief against the appellee. The petition, omitting formal allegations, is as follows:

"2. That on or about March 14th, 1930, the defendant, James O'Hare, and W. H. Byrne entered into a certain written lease with this plaintiff whereby they leased to plaintiff for the term of five years, beginning July 1, 1930, lot five, in block fifty-one, City of North Bend, Nebraska; that exhibit 'A' hereto attached and made a part hereof is a true and correct copy of said lease; that said lease was duly filed of record in the office of the register of deeds of Dodge county, Nebraska, at 8:40 a. m., March 26th, 1930, and recorded on page 505 in Book 'K,' of the Miscellaneous Records in said office.

"3. That pursuant to the requirements and stipulations of said lease, the said defendant, O'Hare, and Byrne erected a service station building with all necessary driveways on said demised premises, and completed the same about September 1st, 1930.

"4. That at the time of the execution and delivery of the aforesaid lease, plaintiff and said W. H. Byrne entered into a written contract whereby plaintiff appointed said W. H. Byrne as its agent to operate for it the filling station on said demised premises; that exhibit 'B' hereto attached and made a part hereof is a true and correct copy of such agency agreement.

"5. That on the completion of said service station building as aforesaid, to wit, on or about September 1st, 1930, this plaintiff entered into possession of said demised premises and service station building, placed therein a stock of merchandise consisting of gasoline, lubricating oils and greases, and installed therein as its agent to operate and manage said service station and carry on plaintiff's business therein and thereat the said W. H. Byrne, who continued to act as such agent of this plaintiff, and to operate

its said station and carry on its said business on said demised premises until about February ——, 1931; that on February 11th, 1931, said W. H. Byrne sold and conveyed all of his right, title and interest in said demised premises to the defendant herein, said deed being duly recorded on February 12th, 1931, in the office of the register of deeds of Dodge county, Nebraska, at page 182, Book of Deeds 67, of the records of said office.

"6. That on the sale and conveyance by said Byrne to O'Hare of his interest in said demised premises as aforesaid, said defendant, under arrangement and agreement with this plaintiff, became and acted as plaintiff's agent in the operation of said service station and in carrying on of plaintiff's business therein and thereat, and during all the times herein mentioned this plaintiff not only placed the initial stock of merchandise in said station, but has from time to time replenished the same and kept said station at all times supplied with an adequate stock of merchandise, consisting of gasoline, lubricating oils and greases, and during all said time both the said Byrne and the defendant herein accounted as agent to this plaintiff for merchandise sold at said service station in strict accordance with the terms of the agency agreement, exhibit 'B' of this petition; that plaintiff's business at said service station is a going business and profitable to this plaintiff.

"7. That this plaintiff has at all times promptly paid the rent according to the terms of said lease, and in strict conformity with the terms thereof, and this plaintiff has at all times paid to said Byrne, while he was acting as plaintiff's agent at said station, and to said defendant during the time he has been acting as agent for this plaintiff, the commissions earned under the said agency agreement.

"8. That said defendant, James O'Hare, heretofore advised and notified this plaintiff that after March 9th, 1930, he would not recognize the aforesaid lease to this plaintiff or continue to act as the agent of this plaintiff in the operation of said filling station and carrying on of plain-

tiff's business therein, and that he repudiated said lease and said agency agreement, and after said date would operate said station in his own behalf and carry on business therein in his own behalf; that thereupon, about two o'clock p. m. on March 9th, 1931, at North Bend, Nebraska, and in and on the aforesaid demised premises, this plaintiff notified said defendant that plaintiff terminated the agency agreement existing between plaintiff and defendant and discharged said defendant as its agent and demanded that said defendant deliver said station and appurtenances an all the equipment thereon or connected therewith, and merchandise consisting of gasoline, lubricating oils and greases to the plaintiff, said demand being in writing, and exhibit 'C' hereto attached and made a part hereof is a true and correct copy of the demand so made; that said defendant refused to comply with said demand and refused to deliver possession of said station, appurtenances, equipment and merchandise to plaintiff.

"9. That plaintiff's leasehold in said premises, by reason of its location on the Lincoln Highway, is of great value and plaintiff's business as carried on therein is a large and profitable business and of great value; that defendant's actions constitute a trespass and a continuing trespass on plaintiff's leasehold estate; and plaintiff's said leasehold estate and plaintiff's said business will be wholly destroyed, to the great damage and loss of this plaintiff, unless said defendant be enjoined and restrained, as hereinafter prayed, from interfering with plaintiff in its possession of said demised premises, and in the operation and carrying on of its said business on said demised premises.

"10. That plaintiff has no adequate remedy at law."

The appellee contends that the affidavit should be considered as an answer and the case considered as having been tried in the lower court, but the lower court held that the affidavit constituted a demurrer against the petition, and we can only consider the question of whether or not appellant has an adequate remedy at law. The merits of the case cannot be considered. *Patterson v. Morehead*, 100 Neb. 760; *City Savings Bank v. Carlon*, 87 Neb. 266.

An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Keplinger v. Woolsey*, 4 Neb. (Unof.) 282; *Lowe v. Prospect Hill Cemetery Ass'n*, 58 Neb. 94; 1 C. J. 1193. Ordinarily, a naked trespass will not be enjoined in equity, but where such trespass is destructive of the leasehold a remedy is provided in equity. Appellee contends that injunction will not lie because before the filing of the suit he, without the consent and against the will of the appellant, took possession of the premises in question. No one can found possession on a tortious trespass alone; nor can any one acquire a right by the commission of a wrong. *Carter v. Warner*, 2 Neb. (Unof.) 688; *Hornung v. Herring*, 74 Neb. 637; *Heaton v. Wireman*, 74 Neb. 817; *Meyers v. Schmidt*, 103 Neb. 475.

In the case of *Nebraska Wheat Growers Ass'n v. Norquest*, 113 Neb. 731, where plaintiff, a cooperative wheat growers association, brought an action to enjoin the defendant from violating his contract and refusing to deliver wheat thereunder, it was held that owing to the particular nature of the plaintiff organization no adequate remedy at law prevailed and the injunction was granted.

In *Roanoke Marble & Granite Co. v. Standard Gas & Oil Supply Co.*, 155 Va. 249, wherein, under a lease similar to the one in this case, it was sought to enjoin the removal of an underground oil tank from the premises and there was a claim of an adequate remedy at law, the court held: "When bill states facts showing threatened trespass which will result in irreparable damage, or which is destructive to the inheritance or that which gives it chief value, injunction will be granted, notwithstanding dispute or pending litigation as to title."

It needs no argument to show that a remedy at law would not afford appellant as complete, prompt and efficient a remedy for the destruction of its business and the personal property therein contained, or the loss of its going business, as would be furnished by a court of equity

in preventing such an injury. Any defense which the appellee may have to the petition must be pleaded.

The decree of the lower court is therefore reversed and the cause remanded to the district court.

REVERSED.

OSCAR O. NEWMAN, APPELLEE, V. NATIONAL UNION FIRE INSURANCE COMPANY, APPELLANT.

FILED DECEMBER 11, 1931. No. 27926.

1. Insurance: POLICY: ASSIGNMENT. An assignment of policy after loss transfers to the assignee the assignor's right to proceeds of the insurance.
2. ———: ———: ———: ESTOPPEL. Junior mortgagee having an insurable interest in property at time of loss, insurer thereafter making an indorsement on policy recognizing title as in such junior mortgagee was without right to claim lack of privity of contract with him, nor if actual liability existed for loss theretofore sustained that it was extinguished.
3. ———: ———: BREACH OF CONDITIONS: RECOVERY. Breach of conditions of fire policy respecting procurement of other insurance without insurer's consent, and failure of notice of commencement of foreclosure proceedings under junior mortgage, *held* not, in view of section 44-322, Comp. St. 1929, to preclude recovery, in absence of evidence that breach in any manner contributed to loss.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Brome, Thomas & McGuire and *G. H. Seig*, for appellant.

Mullen & Morrissey, W. J. Hammond and *Paul P. Massey, contra.*

Heard before ROSE, GOOD and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

LANDIS, District Judge.

Oscar O. Newman, plaintiff below, appellee here, recovered a judgment against the National Union Fire Insurance Company, a corporation, upon a policy of fire insurance. The insurance company appeals from the judgment.

There is no serious conflict as to the facts in this case. On July 16, 1927, appellant issued to one Salyers its combined farm policy insuring certain property against fire and tornado for three years and received a premium of $28.88 therefor. This policy carried an indorsement of the standard loss payable clause to the Fidelity Mutual Life Insurance Company, as mortgagee. On January 27, 1928, another indorsement was added to the policy in substance reciting that in consideration of $28.43 additional premium the insurance for Salyers on his farm buildings was increased to end July 16, 1930, the termination date of the policy. On January 11, 1929, an additional indorsement was made by appellant to the policy which recites: "Title to the property described herein is now vested in O. O. Newman. Policy is hereby transferred to cover in his name, as the assured."

On March 17, 1928, a fire occurred on the premises destroying three buildings covered by the insurance under the policy in suit as barn $750, granary $300, and hog house $200. With no claim of fraud or negligence this loss stands unchallenged as other than what is commonly called an "honest loss."

Salyers carried a policy in the State Farmers Insurance Company upon the property involved in this loss, brought an action thereon, and on April 14, 1928, recovered judgment therein which was afterwards paid, satisfied and released.

No proof of loss was ever made to appellant upon its insurance policy by either Salyers or the Fidelity Mutual Life Insurance Company. Salyers, as a party defendant, answered disclaiming any interest in or right to the policy in suit or the property insured. The Fidelity Mutual Life Insurance Company assigned its right and interest under the policy declared on to the appellee before this action was instituted.

When appellant issued its policy appellee had a second mortgage upon the property under which he had instituted foreclosure proceedings March 2, 1927. Issues were

joined, case tried, and decree entered July 23, 1927, foreclosing this second mortgage and ordering a sale of the premises. Sale was had under the decree, appellee purchased the property, sale confirmed by order of court June 11, 1928, and deed issued conveying title of the property to him. Proof of loss was furnished appellant about July 13, 1929, by appellee. The mortgage clause indorsed on the policy contains the following:

"On payment to such mortgagee * * * of any sum for loss or damage hereunder, if this company shall claim that as to the mortgagor or owner, no liability existed, it shall, to the extent of such payment, be subrogated to the mortgagee's * * * right of recovery and claim upon the collateral to the mortgage debt, but without impairing the mortgagee's * * * right to sue."

Appellant contends that this provides for subrogation to it by the Fidelity Mutual Life Insurance Company, under its first mortgage, to the extent and in the amount of any payment made under its policy to said mortgagee. It asks that appellee's claims be dismissed or, in event judgment be entered against appellant, that it be subrogated to the extent and in the amount of said judgment, under the mortgage; further, that appellee be decreed to pay appellant under the mortgage, the amount it is required to pay on the policy, and in default of such payment appellant be entitled to maintain an action to foreclose its interest, as determined, under said mortgage. In effect this provision in the mortgage clause provides that whenever appellant shall pay the mortgagee any sum on account of a loss and shall claim that as to the mortgagor or owner no liability exists then the appellant is subrogated to the mortgagee's rights and securities. Appellant has paid nothing on account of the loss and by indorsement to the policy agrees that the property described therein is vested in appellee and that he be substituted as the assured. It seems clear that before subrogation could be considered according to the express terms of the loss payable clause appellant must pay something out on ac-

count of a loss under the policy and a determination had that there is no liability under the policy to the appellee. The evidence shows that the appellee paid both of the premiums on the policy; that he was not a stranger to the property, having a second mortgage against it; that he did not know until after the loss that Salyers had other insurance on the property; that he notified Mr. Welch of Omaha, who issued the policy and was agent for the appellant for the state of Nebraska, that he was starting foreclosure proceedings under his second mortgage against the property; that notice of the loss was given appellant by the Fidelity Mutual Life Insurance Company; that in response to this notice appellant sent proofs of loss to the said life insurance company; that appellee furnished proof of loss in July, 1929, and demanded payment. Appellant denied liability on its policy on grounds other than failure to give timely proof of loss. Appellant in its answer alleges that the appellee was not a party to the policy at the time the fire occurred and has no rights thereunder by virtue of any loss. But the appellant by its indorsement of January 11, 1929, says appellee is owner of the property covered by its contract, and places the policy in his name. True, a loss had occurred, but appellee had an insurable interest at the time of the loss. Also, appellant has and retains the premium consideration for the insurance under the policy. An assignment of the policy after loss transfers to the assignee the right to the proceeds of the insurance. In view of the indorsement made by appellant on the policy January 11, 1929, it cannot claim lack of privity of contract with appellee, nor if actual liability existed for the loss already sustained that it is extinguished. Discussion of cases where assignments were made after loss had occurred may be found in notes at 56 A. L. R. 1391; 3 Am. & Eng. Ann. Cas. 476; 56 Am. Dec. 749.

Appellant not only denies any liability to appellee for the loss because of lack of privity of contract with him, but contends that there are conditions in the policy

breached, as procurement of other fire insurance on the property without its consent, and failure of notice of the commencement of foreclosure proceedings under the second lien. Section 44-322, Comp. St. 1929, provides: "The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding." There is no evidence in the record that the breaches of the policy complained of by appellant in any manner contributed to the loss. Appellant in its answer makes no such claim. In *Calnon v. Fidelity-Phenix Fire Ins. Co.*, 114 Neb. 194, where section 44-322, *supra*, was considered, the rule is announced in the syllabus as: "Under the statute, the violation of a condition in a fire insurance policy by the mortgaging of the property insured does not invalidate the insurance, unless the breach of contract contributes to the loss." This section of the statute was considered by the circuit court of appeals of the eighth circuit in *Westchester Fire Ins. Co. v. Norfolk Building & Loan Ass'n*, 14 Fed. (2d) 524, on the question of breach of the conditions of a policy of fire insurance on notice of change of title. The court say: "There is no evidence in the record tending to show that any purported change in title by reason of the foreclosure proceedings contributed in any way to the loss, and it has been held by the supreme court of Nebraska * * * that a breach of conditions in a fire insurance policy does not invalidate the insurance policy unless the breach of conditions contributed to the loss."

Below, upon motion of appellant, unopposed by the appellee, this cause was transferred to the equity docket of the district court and tried as an action in equity. Upon trial *de novo* independent of the findings and judgment of the trial court, we come to the same conclusions. Hence, the decree of the district court is

AFFIRMED.

BRONISLAWA SIEDLIK, APPELLANT, V. SWIFT & COMPANY, APPELLEE.

FILED DECEMBER 11, 1931. No. 28113.

1. **Master and Servant:** WORKMAN'S COMPENSATION ACT: INJURY TO EMPLOYEE: LIABILITY. Second accident occurring to employee while on his way to work at 6:30 a. m., *held* primary cause of death, and it was improbable that first accident, sustained at work, from which there was apparent recovery, was contributing cause.
2. ———: ———: ———: NONCOMPENSABLE INJURY. Injury to employee from stepping into hole while on way to work and before reporting therefor, *held* not compensable as not arising "in the course of employment" (Comp. St. 1929, sec. 48-152). Section 48-152, Comp. St. 1929, relating to "personal injuries arising out of and in the course of employment" is declared "not to cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen."

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

Anson H. Bigelow and *Anthony Zaleski,* for appellant.

George H. Winn and *Brown, Fitch & West, contra.*

Heard before ROSE, GOOD and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

LANDIS, District Judge.

This action arises under the workmen's compensation law. Appellant Bronislawa Siedlik seeks to recover compensation for the death of her husband Stanley Siedlik from his employer Swift & Company, appellee.

The deceased, while working in appellee's cold storage room, piling barrels of meat, and wearing shoes with thick wooden soles, jumped down from a height of about three and one-half feet onto the cement floor. He complained that he had "jumped wrong," rubbed his leg and thereafter limpingly went over to other work where he was not required to lift. He continued his work that day, but when

he got home at night bathed his ankle, which was swollen and slightly red, in hot water, and applied salve and bandages. He applied home remedies for a week; limped for at least two weeks, but continued to work for appellee, losing no time until April 9, 1929.

The date of the accident is fixed by the widow as on a Friday two or three weeks before April 9. The Friday two weeks before would be March 22, and three weeks would be March 15. No report was made of the accident to the appellee, and the exact date on which it occurred is not otherwise definitely fixed in the record.

On April 9, 1929, the deceased had a second accident which happened near the Union Pacific depot, several blocks away from the appellee's plant. He was coming to work around 6:30 a. m., and stepped into a hole near the depot. When he got to the office of appellee his leg pained him; was bloodless and cold. He was immediately removed to the hospital. The deceased was at the hospital in the care of Dr. E. C. Henry from April 9 to the day of his death on June 10, 1929. The cause of his death was septicemia secondary to gangrenous leg, which was caused by obstruction of circulation to the leg below the knee.

Appellant's physicians were of the opinion that the March accident caused a hemorrhage into the muscle, commonly known as Charley horse; that the second accident of April 9 in the same leg was a "relighting up" of the first injury, with the primary cause of the death in the March accident.

Appellee's physicians were of the opinion that the April 9 accident caused a blocking of the circulation in the popliteal artery right back of the knee joint, and that this was the primary cause of the death, and not the March accident from which deceased had apparently recovered.

On April 23 the leg was amputated above the knee; on June 4 again at the hip. The complete hospital and clinical record of the deceased is in evidence. Doctor Henry, after the first amputation, dissected the leg and found a clot on the inside of the popliteal artery at about the knee.

The first question to determine is whether the March or April accident was the primary cause of the death. As provided in section 48-137, Comp. St. 1929, this appeal must be determined *de novo*. Considering the entire record, we find that the April 9, 1929, accident occurring to the deceased before he reported for work, at a place some blocks away from the appellee's plant, was the primary cause of his death; further, that it is improbable that the March, 1929, accident, from which deceased had apparently recovered, was a contributing cause of his death.

Appellant contends that the April 9 accident should be reasonably considered as one in the course of employment and compensable, under the law. By our statute "personal injuries arising out of and in the course of employment" is declared "not to cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen." Comp. St. 1929, sec. 48-152. The deceased was going to work on April 9, 1929, and the accident occurred before he reported at the place where his services for appellee were to be performed, and some blocks away therefrom. The record does not disclose any circumstances to base a finding that the injury of April 9 occurred other than independent of the relation of master and servant. It is clear that we are confronted here with an injured interest which does not fall within the protection of the workmen's compensation law.

In both *Tragas v. Cudahy Packing Co.*, 110 Neb. 329, and *Speas v. Boone County*, 119 Neb. 58, the facts are dissimilar from the instant case. These cases are not authority for declaring an injury occurring independent of the relation of master and servant as compensable under our statute.

Independent of the findings and judgment entered by the district court, on trial *de novo* here we reach the same conclusions. The judgment of the district court is therefore

AFFIRMED.

BESSIE GLICK, SPECIAL ADMINISTRATRIX, APPELLEE, V. BURT POSKA, APPELLANT.

FILED DECEMBER 11, 1931. No. 27937.

1. Trial: VERDICT: SETTING ASIDE. A verdict should be set aside on the ground that it was arrived at by chance, or is a "quotient" verdict, only upon a clear showing that it is the result of chance or is a "quotient" verdict, instead of the result of deliberation.
2. ———: ———: IMPEACHMENT. Generally, testimony of jurors will not be considered to impeach their verdict in respect to matters which essentially inhere in the verdict itself, and as to matters resting alone in the breasts of the jurors.
3. Automobiles: INJURY TO GUEST: REASONABLE CARE: QUESTION FOR JURY. The standard of the duty of an invited guest riding in an automobile is the same as the driver's, but the conduct to fulfil that duty is ordinarily different because their circumstances are different. Whether reasonable care has been exercised in either case is a question of fact for the jury, unless the facts were such as to which reasonable minds would not differ in declaring such facts to constitute negligence.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Frederick J. Patz and *Louis B. Finkelstein,* for appellant.

Richard F. Stout, contra.

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and RAPER and RYAN, District Judges.

RAPER, District Judge.

This is an action brought by Bessie Glick, as special administratrix of the estate of Clarence T. Glick, her deceased husband, on behalf of herself and two minor children, aged eleven and seven years, respectively, and is based upon alleged negligence of the defendant. Plaintiff's petition alleges that the deceased was riding as an invited guest of the defendant in defendant's automobile, and that defendant was negligent in operation of his car, which resulted in the automobile overturning, causing the death of Clarence T. Glick. Defendant in his answer denies the allegations of negligence, denies that plaintiff was an in-

vited guest of defendant, and alleges that deceased and defendant were engaged in a joint enterprise using defendant's car, and that deceased directed and controlled the direction, course and operation of the car, and was guilty of the negligence which caused the accident. The cause was submitted to the jury, and a verdict and judgment were awarded plaintiff. Defendant appeals.

At the close of the testimony defendant moved for a directed verdict in his favor because the undisputed evidence showed that the negligence of the deceased was more than slight. The court's refusal to grant the request is one of the alleged errors, and another error complained of is that the court refused to dismiss plaintiff's action because there was not sufficient evidence to support a verdict in her favor. A careful study of the evidence discloses a state of facts which adequately supports plaintiff's allegations of negligence; that deceased was an invited guest of defendant; and was not guilty of negligence, more than slight, or of any negligence. The evidence of plaintiff being sufficient to warrant a verdict for plaintiff, the court properly denied the motions.

Appellant objects to instruction No. 8, as given. This instruction outlines fully and in detail the claims of the parties respectively as alleged in the pleadings and as supported by evidence. It is claimed by appellant that one part of the instruction varies from another to the prejudice of appellant, in this: One part of the instruction states that the defendant claims "Glick directed and controlled the operation of the car in the course and route to be taken," and in another place it states "that Glick did not have or exercise control over the operation of the car." Appellant asserts that the changed phraseology gave the wrong direction to the jury. We are unable to see how this slight variation, in connection with the substance of the whole instruction, could have misled the jury. Another objection is that, after stating that if Glick did certain acts, and such acts constituted negligence, then such negligence would be imputed to Glick himself, the court should

have added "and plaintiff cannot recover." In other instructions proper exposition was given as to negligence, contributory negligence, and the rights of the respective parties to recover under certain circumstances if negligence of either party was proved, and the omission of that clause in instruction No. 8 was not error. The instruction was as favorable to defendant as the pleadings and evidence warranted.

The evidence discloses that deceased was a brakeman employed by the Burlington railroad company, and at his home about 10 o'clock in the evening a call came to him to report for duty at 11 o'clock. The deceased and defendant, with a third man, got in defendant's car, a coupé, deceased sitting on the right hand side, and started for deceased's destination, which was west of some of the railroad tracks, where defendant was cautioned to watch for trains and to not drive so fast. Near there was a culvert. Defendant drove the car, and some time before they reached the scene of the accident deceased told defendant to make a turn or turns at certain streets and cautioned defendant against driving so fast.

The defendant's car had good lights, the road and culvert were in plain view and defendant was driving from 20 to 25 miles an hour. The road made a turn near the culvert. At or about the time the car was on the culvert, the defendant, in order to make the turn suddenly, turned the car sharply (or jerked the wheel around, as the third passenger stated) which caused the car to turn sharply on the culvert. The front wheels passed over, but the hind wheel missed the edge, which caused the car to lurch and perhaps veer somewhat. After going across the culvert about half the length of the car, it stopped, apparently tilted to the right and poised momentarily, then upset on its right side. While the car was stopping, the deceased evidently opened the right door and got out of the car, for the car fell on him. There was no obstacle immediately in front of defendant which required him to turn the car so suddenly and sharply. The defendant testified he turned the car at

the request of deceased but this was not admitted by plaintiff, but plaintiff claims that defendant failed to notice the turn in the road until on the culvert, and that at the speed he was driving it was negligence to make so sharp a turn, even if deceased had suggested the turn, and the evidence is sufficient to support plaintiff's theory. It was a question for the jury to determine.

This brief résumé, which does not give accurately the full details, is sufficient to indicate in a general way the manner in which the accident occurred.

The defendant claims that deceased was guilty of negligence in getting out of the car as it stopped. This was submitted to the jury and determined adversely to defendant.

Appellant complains of instruction No. 13, which advises the jury as to the measure of damages, in that the court did not tell the jury that they must base their findings upon the evidence. In another instruction it was stated that their verdict must be based upon the evidence, and the failure to again so charge the jury in instruction No. 13 was not prejudicial.

Another objection to the instruction is that the court tells the jury that they might consider deceased's prospects for future increase of earnings, which appellant insists was without any evidence to support that part of the charge. It is shown by the evidence that the deceased was a brakeman, and was on the "call list," that is, he did not have steady employment with the railroad; that the right to steady employment was given to employees who had been longer in service, and the jury might reasonably infer that in the future he would by reason of seniority be given more steady employment. When he worked as brakeman he earned $200 a month. When not so employed he earned at other occupations about $20 to $30 a week. We are not prepared to say from the record that there was no evidence to support that part of the charge.

Further, the appellant urges that there was no proof of the physical condition of Mr. and Mrs. Glick. There

was inquiry made by defendant's counsel in cross-examining Mrs. Glick as to the physical condition of the deceased. She told of deceased having suffered an injury in an automobile accident some time prior to the time of his death, but she stated that he had almost recovered, and was able to do his work. The nature and extent of those injuries were not inquired into. There was sufficient evidence to warrant the jury in finding that deceased was in ordinary health. There was no proof of the physical condition of plaintiff, but she gave her age as 31, and tables of expectancy were received both as to her expectancy and his. The omission to show her physical condition, when first raised on appeal, may be met by the holding in *Bauer v. Griess*, 105 Neb. 381. The instruction did advise the jury that if they found for plaintiff they should take into consideration the age and the fair and reasonable earning ability as disclosed by his past actual earnings, his physical condition at the time of his death, the age and physical condition of the widow, Bessie Glick, and the probable duration of the life of both Clarence T. Glick and his wife, which placed the matter fairly to the jury, and besides no further instruction about it was tendered by defendant.

Other assigned errors are that the court erred in failing to instruct the jury not to consider the matter of insurance and in permitting plaintiff to show that defendant carried insurance. No request was made for an instruction about insurance. It is the settled policy of this state that a party may show that defendant carried insurance.

Some of the jurors gave evidence that the jury in their deliberations considered the fact that defendant carried liability insurance. Courts are slow to accept such evidence to impeach a verdict; furthermore, there is no affirmative statements by any of the jurors that he was influenced by the fact that the defendant carried insurance.

The remaining assignment of error is that the verdict was the result of chance. Six jurors made affidavit that the jury agreed to write the sum which each juror thought the plaintiff should recover, add those amounts and divide

the sum thus found by twelve, and the quotient should be given and awarded as the verdict to be returned for plaintiff, and that was the amount given in the verdict. Four of those recanted in later affidavits, and stated they had misunderstood their first affidavits, and averred that the jurors did write down the amount they believed the plaintiff should recover, and divide by twelve the sum obtained by adding those amounts, that there was no agreement before such proceeding that the quotient should be the amount of their verdict, and that such proceeding was had only to get the viewpoint of the jurors in order to see if they might adjust their differences. Two other jurors deponed to the same facts as the four above mentioned, and that after the sum so found was announced there was further discussion. None of the jurors stated that they had felt bound by or agreed to the verdict because of any agreement to abide by the proceeding. The proof is quite conclusive that there was no agreement to abide by or accept the quotient as their final verdict, and after the quotient was announced there was some objection to the amount and after further discussion the amount was voluntarily approved by all the jurors.

The mere fact that the jury during the course of their deliberations in order to get the viewpoint of the jurors, to see if they might compose their differences of opinion as to the amount that should be allowed, undertake to average their judgment may not be objectionable, unless it appears that before doing so they agree to be bound by such chance methods after such result has been reached. *Cortelyou v. McCarthy*, 37 Neb. 742; *Janesovsky v. Rathman*, 107 Neb. 165.

Appellant urges that the verdict is excessive. The verdict is for a large sum, but under the situation shown we cannot say it is excessive.

The judgment of the district court is

AFFIRMED.

TRAVELERS INSURANCE COMPANY OF HARTFORD, APPELLEE, V. WALTER J. SAWICKI ET AL., APPELLEES: CHRISTIAN C. HANSEN ET AL., APPELLANTS.

FILED DECEMBER 16, 1931. No. 28005.

Appeal: BILL OF EXCEPTIONS. In the absence of a bill of exceptions, a finding of fact, or ruling upon a motion, based upon evidence, will be presumed to be supported thereby.

APPEAL from the district court for Greeley county: RALPH R. HORTH, JUDGE. *Affirmed.*

Badham & Pedersen, B. J. Cunningham and *Edgar B. Zabriskie,* for appellants.

Lanigan & Lanigan and *F. B. Goudy, contra.*

Heard before ROSE, GOOD, DAY and PAINE, JJ., and LESLIE, District Judge.

PER CURIAM.

This is an appeal from an order overruling motion by defendants to vacate an order appointing a receiver in an action for foreclosure of a real estate mortgage.

The record discloses that the decree of foreclosure was entered June 25, 1930, and that a receiver was appointed November 10, 1930. The order appointing the receiver recites:

"This cause came on for hearing in open court on the application of the plaintiff for the appointment of a receiver, and the court being fully advised in the premises finds that due and legal notice of hearing on said application has been had on the defendants. * * *

"On consideration of the pleadings and the evidence the court finds that the allegations of plaintiff's application are true and that the mortgaged premises are insufficient in value to pay said mortgage indebtedness," etc.

On January 27, 1931, defendant Hansen filed a motion to vacate and set aside the order appointing a receiver, on the grounds "that no legal service of notice of a hearing (was) had upon this defendant or his attorney of record,

provided by statute," and that the receiver was an interested party and an improper person to be appointed. The journal entry overruling the motion shows that the motion was submitted to the court upon the evidence.

There is no bill of exceptions. We are not advised as to what evidence was presented to the court either upon the application for the appointment of a receiver or upon the motion to vacate. There may have been evidence showing that defendants, at the hearing on the application for appointment of a receiver, appeared and resisted the appointment; in fact, there improperly appears in the transcript certain affidavits indicating that such was the fact; or the evidence may have indicated that defendants had been duly served with notice of the hearing or had waived such notice. We are unable to say what the fact is.

A finding of fact by the trial court, based upon evidence, cannot be reviewed in the absence of a bill of exceptions; but it will be presumed that the finding is supported by sufficient evidence.

The record presented discloses no error in the court's ruling on the motion. The order is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FIRST STATE BANK OF ALLIANCE, APPELLANT: CITY OF ALLIANCE, APPELLEE.

FILED DECEMBER 16, 1931. No. 27989.

1. **Banks and Banking**: GUARANTY FUND: DEPOSITS: PREFERENCES. A city that exacts from a state bank collateral security for deposits, receives the proceeds of the security after insolvency of the bank and presents to the receiver a claim for excess of deposits over such proceeds, is in the class of depositors "otherwise secured" and not entitled to share the assets of the bank on an equality with depositors in the class "not otherwise secured," within the meaning of the statute providing that depositors and holders of exchange in the latter class shall have the first lien, with the exception of taxes. Comp. St. 1929, sec. 8-1,102.

2. **Constitutional Law:** POWERS OF LEGISLATURE: CLASSIFICATION. The legislature has power to make reasonable classifications of persons and objects for the purposes of legislation affecting diversely the different classes.
3. ———: ———: BANKS AND BANKING: CLASSIFICATION OF DEPOSITORS. Legislative classification of depositors in state banks for the purpose of determining priority of claims in the event of insolvency *held* valid.

APPEAL from the district court for Box Butte county: EARL L. MEYER, JUDGE. *Reversed.*

F. C. Radke, Barlow Nye and *W. A. Crossland,* for appellant.

Boyd & Metz, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

ROSE, J.

In a proceeding by the state to wind up the affairs of the First State Bank of Alliance, an insolvent banking corporation, the city of Alliance intervened and presented a claim for deposits on an equality with all unpaid depositors having preferred claims.

The First State Bank suspended the business of commercial banking December 30, 1929, when the city had on deposit therein $14,691.56 on which there was accrued interest of $189.15, making a total of $14,880.71. As security for city deposits the First State Bank, September 20, 1929, had pledged seven 1,000-dollar 5 per cent. Federal Land Bank bonds, all of the face value of $7,000, which, for that purpose, were delivered to the Lincoln Trust Company. The bonds were sold June 4, 1930. The net proceeds were $7,158.09 which were credited on the city's deposits. For the difference between the deposits and interest amounting to $14,880.71 and a credit of $7,158.09 derived from the sale of the bonds, or $7,722.62, the city filed with the receiver a claim as a valid unsecured preferred claim against the assets of the First State Bank entitling claimant to participate in the depositors' final

settlement fund. The receiver treated the city's claim as a general one payable only from assets of the First State Bank after payment of preferred claims of depositors. Later the city intervened by petition, pleaded in detail the facts constituting its claim and asserted the right to have it adjudged a preferred claim entitling intervener to share the assets of the bank on an equality with other preferred creditors and to participate in the depositors' final settlement fund.

An answer of the receiver to the petition in intervention contained a general denial and a plea that intervener's claim was "otherwise secured" and therefore not a preferred claim within the meaning of the statute which in part provides:

"The claims of depositors, for deposits, not otherwise secured, and claims of holders of exchange, shall have priority over all other claims, except federal, state, county and municipal taxes, and subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership, including the liability of stockholders, and, upon proof thereof, they shall be paid immediately out of the available cash in the hands of the receiver. If the cash in the hands of the receiver available for such purposes, be insufficient to pay the claims of depositors whose deposits are not otherwise secured, and holders of exchange, not given for a previously existing debt of the bank other than a deposit, the court in which the receivership is pending, or a judge thereof, upon hearing shall determine the amount required to supply the deficiency and cause the same to be certified to the department of trade and commerce as a claim entitled to the benefits of the depositors' final settlement fund." Comp. St. 1929, sec. 8-1,102.

The facts pleaded by the receiver as defenses were put in issue by a reply.

Upon a trial of the issues raised by the pleadings the district court found that intervener had a valid preferred

claim on the assets of the First State Bank for $7,722.62; that intervener was entitled to the benefit of the depositors' final settlement fund; that the receiver had in his hands sufficient cash to pay a dividend of 45 per cent. on preferred claims, including the claim of intervener. The decree directed the receiver to pay forthwith to intervener, in common with other preferred depositors in the same class, a dividend of 45 per cent., or $3,475.18, and requiring certification of the balance of the claim, or $4,247.44, to the department of trade and commerce as an adjudicated claim entitling intervener to participate in the depositors' final settlement fund. The receiver appealed.

The appeal presents this question: Was the city of Alliance a preferred creditor of the First State Bank within the meaning of the statutes? Stated differently, did the city, by exacting bonds as security for its deposits, prevent itself from participating in the assets of the bank and in the depositors' final settlement fund for the difference between the amount of the deposits and the proceeds of the bonds, on an equality with preferred creditors or depositors "not otherwise secured?" In the briefs and in the arguments at the bar the question was skilfully presented on both sides. The solution depends on what the legislature meant by the term, "not otherwise secured," as used in that portion of the statute already quoted, when considered with all statutes relating to banks and banking, to the winding up of insolvent banks, to the distribution of assets among creditors and to the depositors' final settlement fund. There is no dispute about any material fact. The facts relating to the deposits of the city, to the bonds pledged as security and to the application of the proceeds of the bonds are as herein recited in the statement of the case.

In addition to bank assets available to creditors in case of insolvency, the legislature made provision for the creation of what is called "Depositors' final settlement fund." This fund is not the property of insolvent banks. It is a trust fund created for the benefit of unpaid depositors

"not otherwise secured" and of holders of exchange. How it shall be disbursed depends on legislation. It was competent for the legislature to make provision for the disbursement of this fund and the proceeds of bank assets. For purposes of legislation the power to classify objects and persons in different situations is undoubted. *Cleland v. Anderson,* 66 Neb. 252. In the statute under consideration the legislative intent to divide deposits into different classes seems clear. One class includes deposits of creditors who rely for security on the bank assets, on the depositors' final settlement fund and on the integrity of the bank and its officers. Another class, not relying on such security, includes deposits of creditors that exact security in the form of bonds or other obligations—a class "otherwise secured." This classification must be considered in determining the priority of claims for deposits. The legislature did not say that a depositor may have a single deposit in both classes, if the proceeds of collateral security pledged to him are insufficient to pay his claim in full. The legislative classification and the general import of the statute indicate the contrary. A depositor "not otherwise secured" cannot resort to the proceeds of bonds pledged to another depositor as security for the latter's deposits. If a depositor partially protected by collateral security were permitted to share the proceeds of bank assets as a preferred creditor on an equality with other depositors not so protected, he would have an advantage over them. The legislation as a whole does not seem to indicate such an intention. An interpretation to that effect would extend the term "otherwise secured" beyond its natural import, when the context is considered. Intervener elected to take bonds as security and afterward made deposits in double the amount of the bonds. It thus became a depositor "otherwise secured" and voluntarily kept its deposits in that class. Excess deposits over proceeds of the pledged bonds are not in the other class. Even in that situation intervener appears to have fared better than depositors "not otherwise secured." From proceeds of its security it

realized more than 50 per cent. of its deposits, while the record shows that preferred creditors "not otherwise secured" shared a dividend of 45 per cent. The record does not show that the legislative classification is unreasonable or that it is inhibited by that part of the federal Constitution relating to due process of law and to the equal protection of the laws. Between the persons and objects classified there is a substantial difference in situations. Persons in one class of depositors have security not available to the other class. There is substantial reason for diverse legislation relating to the persons and objects classified. The statute operates uniformly on all persons and objects in a class. The classification therefore was within legislative power. *Wenham v. State*, 65 Neb. 394; *Cleland v. Anderson*, 66 Neb. 252; *Althaus v. State*, 94 Neb. 780. In this view of the law intervener was "otherwise secured" and not in the class entitled to share as preferred creditors the assets of the bank and the depositors' final settlement fund. Within the meaning of the statute intervener's claim should have been allowed only as a general one and the district court erred in holding otherwise. The judgment from which the appeal was taken is therefore reversed and the cause remanded for a decree conforming to this opinion.

REVERSED.

VERNE CROMWELL, APPELLANT, V. FILLMORE COUNTY, APPELLEE.

FILED DECEMBER 16, 1931. No. 27947.

1. **Highways: DEFECTS: INJURY TO AUTOMOBILIST: NOTICE: ADMISSIBILITY OF EVIDENCE.** In an action to recover for injuries received by driving an automobile over an alleged negligently maintained highway, evidence that, shortly before, another person driving an automobile had been injured at the same place is admissible on the question of notice to the county.
2. **———: ———: QUESTIONS FOR JURY.** Under the facts stated in the opinion, the questions of negligence and contributory negligence were for the jury.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Reversed.*

Waring & Waring, for appellant.

Thomas J. Keenan and *J. W. Hammond, contra.*

Heard before ROSE, GOOD, PAINE and DAY, JJ., and BEGLEY, District Judge.

BEGLEY, District Judge.

Action to recover damages alleged to have been sustained by reason of the insufficiency and want of repair of a public highway. At the conclusion of plaintiff's evidence, on motion of the defendant, the court directed a verdict for defendant, and plaintiff has appealed. The parties will be designated as plaintiff and defendant as they appeared below.

The place of the accident is located at the foot of a hill where the highway is crossed by a creek over which is built a culvert and the roadway raised or filled to a height of eight or nine feet. More than a week prior to the date of the accident, a storm had washed a ditch across the fill at the point where the culvert was erected, some six or eight feet deep and about three feet wide, and also washed large circular holes from six to eight feet deep south of the culvert, which holes extended into the main portion of the highway. Prior to the accident, the county had attempted to fill the ditch that extended across the road with loose dirt, which in the course of time settled, leaving several deep chuck-holes or ruts, eight to ten inches deep, and extending practically across the highway. However, the county did nothing toward filling the holes in the side of the road and which extended into the traveled portion.

On August 28, 1930, about seven p. m., the plaintiff was traveling on this highway from the north in his automobile, at a rate of speed of about twenty to twenty-five miles an hour, with his lights on, and when within about eight to ten feet of the same, he observed some deep ruts which

threw him to the east, and in order to avoid the large holes which had been washed in the side of the road he jerked his car to the west and upset, and was severely injured. Plaintiff testified that his lights were bright and that he was keeping a lookout ahead, but that in driving down the hill his lights didn't throw their rays down the highway as they would on a level, and just as he came onto the level and when within about eight or ten feet of the ruts, his lights disclosed same; that he put on his brakes, but it was too late to avoid the accident; that there were no lights or warning signals anywhere in the road to warn him of the defect. We think there is sufficient evidence to carry the question as to the insufficiency or want of repair of the highway to the jury.

Plaintiff also offered to show by the evidence that, previous to the accident in question, another accident had occurred at this point and a claim for damages had been filed with the county commissioners. This was excluded by the trial court. This evidence should have been admitted to show constructive notice to the board of county commissioners. 65 A. L. R. 397, note.

The defendant, however, argues that plaintiff cannot recover because he was driving his automobile at a speed which prevented stopping within the length of his vision and therefore was guilty of contributory negligence. This is a hard and fast rule, and there is considerable division in the opinions of the courts regarding it. The cases are annotated and commented on in notes in 44 A. L. R. 1403, and 58 A. L. R. 1493. In the case of *Tutsch v. Omaha Structural Steel Works*, 110 Neb. 585, this question was before this court and the court refused to apply the rule contended for in all its strictness and held: "In determining whether or not plaintiff acted as a reasonably prudent man, there must be considered the surrounding conditions, such as the darkness of the morning, the uncertainties of artificial light, the suddenness with which the danger confronted him, the quality of the danger, the absence of the red light which might have better prepared him to meet

the danger," etc. In the case of *Roth v. Blomquist,* 117 Neb. 444, this court said that this was the general rule, but that there are recognized exceptions or instances to which it does not apply, among them, an unbarricaded, unknown, open, unlighted ditch across a highway that could only be seen at close range and not anticipated.

In the case of *Axelson v. Jardine,* 57 N. Dak. 524, 535, on petition for rehearing the court in discussing this proposition said:

"The rule contended for by appellant does not apply in this case for the reason that the driver could have stopped the car within the distance he could see, and the question of whether the plaintiff was negligent or not in not stopping the car when he could have stopped it within the distance he could see was for the jury under the facts and circumstances.

"It is negligence to drive a car so fast that you cannot stop it within the distance you can see. It is the reckless speed that makes the negligence. That element is absent in this case and the rule does not apply. A case very much in point is the case of *Tutsch v. Omaha Structural Steel Works,* 110 Neb. 585."

In this case it is not the negligent speed at which the plaintiff's car was driven that prevented him from stopping within the range of his headlights, but it was rather his inability to see the ruts in the road in time to stop his car. In the case of *Roth v. Blomquist, supra,* the facts showed that the plaintiff's automobile collided with a team and wagon crossing the highway at right angles and same should have been anticipated. In that case the team and wagon were rightfully upon the highway, while in this case the county was negligent in not placing the highway in proper repair. Thus each case must be considered in the light of its own peculiar state of facts and circumstances. After all, the test is, what would an ordinarily prudent person have done under the circumstances as they then appeared to exist. Plaintiff had the right to assume, in the absence of notice to the contrary, that defendant

would keep its highway in a reasonably safe state of repair, or that it would give the public proper warning of any defect in the highway. The plaintiff testified that, on account of the topography of the ground in coming down the hill, his lights did not throw their rays down on the culvert and that he was unable to see these ruts or depressions until too late to avoid running into them.

We think that plaintiff's testimony presented questions of fact that should have been submitted to the jury and that the court erred in directing a verdict for the defendant.

REVERSED AND REMANDED.

ALBERT C. ATWATER, APPELLEE, V. CLARA M. SELLERS ET AL., APPELLANTS.

FILED DECEMBER 16, 1931. NO. 27891.

1. **Contracts**: AGREEMENTS RELATING TO LITIGATION: PUBLIC POLICY. All agreements relating to proceedings in the courts, civil or criminal, which may involve anything inconsistent with the full and impartial course of justice therein, are void as against public policy.
2. ———: ———: GOOD FAITH. The good faith of the parties to a contract is not the test of its validity; the contract must be measured by its tendency and not merely by what was done to carry it out.
3. **Appeal**: VERDICT: SETTING ASIDE. A verdict of the jury sustaining an oral agreement wherein, by the evidence, it was shown that no particular definite thing was to be done, only that one of the contracting parties, who had nursed deceased during his last illness and had witnessed the deceased's last will, was to use his influence and do what he could in establishing sentiment in the community in favor of the heirs under the will, may be set aside for the reason that such a contract is void as being against public policy.
4. ———: ———: ———. Where the jury's verdict is clearly against the weight and reasonableness of the evidence, it will be set aside.

APPEAL from the district court for Adams county: CHARLES E. ELDRED, JUDGE. *Reversed and dismissed.*

Charles E. Bruckman, for appellants.

Bernard McNeny, James F. Crowley, James S. Gilham and *L. A. Sprague, contra.*

Heard before ROSE, GOOD and DAY, JJ., and MESSMORE and NISLEY, District Judges.

MESSMORE, District Judge.

This is an action brought by appellee in the district court for Adams county to recover from appellants the sum of $5,000, together with interest thereon, for services alleged to have been rendered under an oral contract. A verdict was returned by the jury in favor of appellee for $6,040. Motion for a new trial was filed and overruled and judgment entered in favor of appellee in the sum of $6,040.

Appellee's petition sets forth that on or about May 10, 1927, William C. McCartney, an unmarried man, possessed of an estate of $125,000, and an uncle of appellants, was lying sick in a hospital in Hastings, Nebraska, without any hope or prospect of recovery from his illness; that previous to his coming to the hospital he had made a will devising and bequeathing his property to the Methodist Hospital in Omaha, Nebraska; that appellee, by inquiry, learned of the existence of appellants and their relationship to said McCartney and by writing to them procured their attendance upon the said McCartney; that thereupon the said McCartney made a second and last will devising and bequeathing his property to appellants; that the said McCartney died May 30, 1927; that appellants were strangers in the state of Nebraska, totally unacquainted with the laws and procedure of its courts or with the practicing attorneys therein and felt themselves helpless to assert their rights under the last will of said deceased; that appellants knew no one except appellee, and they made an arrangement with him that if he, appellee, would assist them in the employment of proper counsel, in the preparation of the necessary evidence for the maintenance of their rights in the courts, and in all respects advise and consult with them as to the assertion of their interests

under said will, they would, in the event of success in securing the property devised by said will, or the major part thereof, pay to appellee the sum of $5,000; that appellee performed his part of said agreement; that said will was duly presented to the county court of Adams county and admitted to probate; that the beneficiary under the first will thereafter appealed to the district court for Adams county and, pending the appeal, the controversy was settled in October, 1927, by giving the beneficiary under the first will $7,200, and the title and rights of appellants in and to all the rest of the estate of the said McCartney were settled in appellants, amounting to upwards of $117,000.

To the petition two answers were filed. The answer of appellant Clara M. Sellers admits the relationship of William C. McCartney to her, his residence, his death; that he was treated for his illness, and possessed of real and personal property in Adams county and elsewhere in excess of the value of $100,000; admits that during the last illness of the said McCartney and while he was confined to the hospital and on or about the 10th day of May, 1927, he made and executed his last will and testament, giving and devising all his property to these appellants, his sole and only heirs at law and next of kin, in equal shares to them and their heirs forever; admits the filing of the petition for the probate of said will in the county court of Adams county, the filing of objections to the probate thereof by the Methodist Episcopal Hospital and Deaconess Home of Omaha; that said will was sustained in said county court and the objections of contestant to the probate thereof overruled, from which ruling and judgment said contestant appealed to the district court for said county; that in the course of the trial on the contest in said district court a settlement was made with contestant, giving it the sum of $6,750; denies all allegations contained in appellee's petition not admitted.

The joint answer of Irene M. Henderson and Harold G. McCartney to the petition of appellee is substantially the same as the answer of the said Clara M. Sellers.

The evidence discloses that appellee was a trained nurse, had lived in Hastings about 18 years, first met William C. McCartney, a man 75 or 76 years of age, who formerly lived in Roseland, Nebraska, when he went to the hospital to nurse him on April 25, 1927, and did nurse him for 5 weeks and up to the date of his death May 30, 1927; that appellee first met appellant Sellers on the 6th of May, 1927, when she came to the hospital where appellee was on duty; that the said William C. McCartney made a will which was drawn by Mr. Whalen, an attorney, and which appellee took and filed with the judge of the county court of Adams county and which was duly filed for probate in said court later; that the Methodist Episcopal Hospital and Deaconess Home filed objections to the probate of said will, which objections were overruled, and contestant appealed to the district court for Adams county.

The oral contract alleged to have been made with Mrs. Sellers was, as shown by the evidence, quoting from the testimony of appellee: "Q. What, if any, agreement did you make with Mrs. Sellers with reference to the contest of the will and the McCartney estate? A. She agreed if I would stay with them and help them and do all I could in helping them establish their claim to the estate that she would pay me $5,000. Q. What were you to do? A. No particular definite thing was mentioned, only I was to use my influence and do what I could in establishing sentiment in their favor in the community."

This alleged agreement was made after the will was offered for probate in the county court and was in a conversation had with Mrs. Sellers about the middle of July, 1927. Continuing: "Q. What else, if anything, was said about what you were to do? A. That was about the substance of it. If I helped them out and they were successful in getting the property they would pay me that amount. Q. What did you do under that agreement you had with Mrs. Sellers? A. I talked with a great many around Hastings and I talked with ones at Roseland and I tried to leave a good impression about these heirs, Mrs. Sellers,

Mr. McCartney and Mrs. Henderson. * * * Q. What did you do about looking up McCartney's record as to his mental capacity after this contest was started? A. I gave my testimony in court."

Witness testified he talked to different ones, a Mr. Hall and his son Leland Hall, to Mr. Mangus, Senator Vance, and Dr. Uridil, the attending physician of William C. McCartney. The evidence developed that the Messrs. Hall were bankers in Roseland, Mr. Vance was a state senator; that he consulted with the attorneys representing appellants after the case was taken to the district court on appeal from the action of the county court in admitting the will to probate; that he talked with the attorneys about the arrangement he made with Mrs. Sellers and talked to Irene M. Henderson and Harold G. McCartney in Mr. Bruckman's office in October when they came from the east. To the question, "State what Irene Henderson and Harold McCartney said to you about the contract, if they said anything," he replied, "The only thing they said was that they were going to make it right with me if I would stand by them. I wouldn't be certain of the exact words." Witness testified that he did everything that the attorneys requested him to do in behalf of appellants.

In corroboration of this agreement appellee offered the testimony of his wife, who testified that the oral agreement was alleged to have been made in the presence of appellee's wife and daughter. Her pertinent testimony on this point is as follows: "Q. Where were you when you had this conversation with Mrs. Sellers? A. One time we were out riding with them in their car. Q. What, if anything, did Mrs. Sellers say to you at that time about a contract or deal she had with your husband? A. We were talking about plans for the future and it came up about the mortgage on our place and she said she would give us the money to pay it. And Mr. Atwater said, 'Does your brother and sister stand back of you in this?' And she said, 'Yes, they do. But in case they shouldn't, I will take it out of my own pocket. I can afford to, can't I?' That she would pay

it out of her own pocket." On cross-examination she was asked the following: "Q. What was Mr. Atwater to do? A. Assist her. Q. What did she want him to do? A. I don't remember. Q. Testify as a witness? A. Yes, sir. Q. Testify as a witness because he had witnessed the will? A. Yes, sir."

The testimony of Mr. Whalen, an attorney, was offered, but a part of it pertaining to the alleged contract was taken from the jury as a privileged communication between attorney and client.

The testimony of L. J. Mangus, pertinent to the alleged contract, was as follows: "Q. After this contest was started on the will, did you have a talk with Mrs. Sellers about any arrangement she made with Mr. Atwater? A. Yes, sir. Q. What was said by her in that conversation? A. Well, she told me she was going to pay the mortgage for Atwater's home for what he had done for them. Q. Did she say what Atwater had done or was going to do for them? A. No; she didn't."

The evidence further discloses that at the time of the contest in the district court over the will it was desirable to have appellee as a witness in that matter; that about that time a letter was written, known as exhibit 1, by appellee to Mr. Bruckman, one of the attorneys for proponents of the will, the substance of which was that he desired to have a car sent for him and arrangements made so that he could leave the case that he was then nursing at Fullerton, and to receive a summons to appear. He further stated in the letter that he received a message from Hastings to the effect that there was more in it for him to stay away from Hastings and that he did not have to come unless he wanted to.

Appellee filed a claim in the county court of Adams county against the estate of William C. McCartney in the sum of $105 on which he was allowed $71, $7 a day for 7 days, 6 days' time and board lost in making two trips from Fullerton to Hastings, also one day testifying to prove will, total $49, which was allowed him, also $14 mileage and also

$7 mileage for another trip to Fullerton and return and a telephone call of $1.50, and he also received an additional $8.10 for testifying in the district court. Said claim was filed October 31, 1927, and paid. The case in the district court was disposed of on the 24th day of October, 1927.

Appellant Sellers testified to the date of her arrival in Nebraska and meeting appellee; denied that she ever made any arrangement with Mr. Atwater of any kind, except that he did complain about his loss of time in nursing, and she stated he would be amply paid for it; denied that she had talked to Mrs. Atwater about paying the mortgage of $4,800 on the Atwater home as being part of the agreement had with Mr. Atwater in the presence of Mrs. Atwater; denied she ever saw the first will wherein her uncle had left his property to the Methodist Hospital in Omaha; testified to the payment to Mr. Atwater of the amount set forth in the claim above and also to the employment of attorneys; that Mr. Whalen drew the will in question, and at the suggestion of one Ed Livingstone she employed Mr. Crow, and that Charlie Byers had suggested the employ ment of Mr. Bruckman and that Hoagland & Carr were employed by her brother and sister, the other appellants.

William Whalen testified for appellants that he was one of the attorneys in the proceedings for the probate of the will, told about the conferences with the other attorneys, and was interrogated as to certain letters and papers and correspondence between appellants and Dr. Uridil and Mr. Atwater being burned or destroyed—he was not sure that they were destroyed; that on the same day, after the case was settled in the district court, something was said about papers, and they were taken from the room; what the papers were witness did not know. The evidence developed that there were a couple of letters written by Mrs. Sellers to Mr. Atwater from the time she had left Nebraska after the probate of the will in the county court and before the contest in the district court, in which letters, as Mr. Atwater testified, she had told him how she was returning, and wherein she said that if he would stay with them he

would never be sorry and that they would make it right with him. Mrs. Sellers denied that she knew anything about any correspondence or letters that she had written Mr. Atwater that were destroyed, that she didn't have copies of the letters with her written by her to appellee.

Appellants contend that the verdict of the jury is clearly against the weight and reasonableness of the evidence.

Concerning the testimony of appellee that no definite thing was to be done by him and that he had talked to persons to build up sentiment in favor of appellants, it developed that these talks were made to an attending physician of William C. McCartney, who was acquainted with appellant Mrs. Sellers, and with two bankers who had lived in the same community with William C. McCartney for years, and with Mr. Vance, a state senator, who was well known in the community. The only way in which this appellee could be of material assistance to appellants in the establishment of their rights and the maintenance thereof under this will, which he witnessed, would be by his testimony as to the mental competency of William C. McCartney at the time the will was made.

We quote from appellee's brief the following language: "There is no complaint that he failed to do what was asked to be done; that he failed in attendance at the office of counsel for defense. How valuable his services might have been had an actual contest of the will developed, we do not know. His relation to the matter was peculiar. He had been the nurse of the testator for five weeks. He knew his physical and mental condition, perhaps, better than any one else. He, probably, could be more helpful than any one else in some of the issues that might arise in the contest." This is tantamount to saying that he was a valuable witness for appellants in asserting their rights and interests before the court in so far as the second and last will was concerned.

The agreement alleged by appellee in his petition was to the effect that he would assist appellants in the employment of proper counsel, in the preparation of the neces-

sary evidence for the maintenance of their rights in court, and in all respects advise and consult with them as to the assertion of their interests under said will, and that appellants, in the event of success in securing the property devised by said will, or the major part thereof, were to pay to appellee the sum of $5,000. The record does not disclose that he assisted appellants in the procuring of counsel. The interest he took in the contest was the interest of a witness, for which he was paid.

The agreement, as pleaded in the petition and upon which the lower court instructed, and the agreement the record portrays are two separate and distinct agreements. The agreement established by the evidence was to the effect that no particular or definite thing was mentioned that appellee was to do, only that he was to use his influence to do what he could in establishing sentiment in favor of appellants in the community. To establish sentiment means to create a mental attitude or thought in favor of appellants in the community, to cause a decision of mind formed by deliberation and reasoning of the people of the community in behalf of these appellants, to create opinion in support of appellants. The agreement, as testified to by appellee, is an agreement that would indicate that sentiment and influence would be an essential thing in assisting appellants to assert their rights and support them in the will contest.

A contract that has for its purpose the creating of sentiment and influence in the assertion and maintenance of appellants' rights is equivalent to saying that that influence and sentiment are the controlling factors in the courts of this state to establish the rights of appellants therein. Such an agreement, by its very nature, would be contrary to public policy and could not be enforced in the courts of this state. Courts of justice will never recognize or uphold any transaction which in its object, operation or tendency is calculated to be prejudicial to the public welfare; that sound morality and civic honesty are the cornerstones of the social edifice is a truism which needs no reenforcement by argument. The question whether a contract is against

public policy must be determined by its purpose and tendency. "It follows, to state the rule comprehensively, that all agreements relating to proceedings in the courts, civil or criminal, which may involve anything inconsistent with the full and impartial course of justice therein, are void, though not open to the charge of actual corruption." *Brown v. First Nat. Bank of Columbus,* 137 Ind. 655. "The law guards with jealousy every avenue to its courts of justice, and strikes down everything in the shape of a contract which may afford a temptation to interfere with its due administration." Note, 13 Am. St. Rep. 297. In *Thomas v. Caulkett,* 57 Mich. 392, the principle set forth therein applies in this case that the good faith of the parties to the contract is not the test of its validity; the contract must be measured by its tendency and not merely by what was done to carry it out. Whatever tends to injustice or restraint of a legal right or to the obstruction of justice, or to the obstruction or perversion of the administration of the law, whenever embodied in or made the subject of a contract, the contract is against public policy and therefore void and not susceptible of enforcement. *Davies v. Davies,* 36 Law Rep. Ch. Div. (Eng.) 364; *State v. First Bank of Nickerson,* 114 Neb. 423.

A restatement of the language used in appellee's brief as to how valuable appellee might have been had the contest on the will not been settled and the peculiar position appellee was in and the knowledge he had would indicate that he was in the position of a witness who might well be in the camp of appellants and his value to appellants would be by his testimony. If this be true, the contract would be against public policy. Such a contract would have a tendency and offer a strong temptation to the procurement of perjury; the tendency of such an arrangement would be to pervert justice, to bring the courts into disrepute and cause a lack of confidence therein. Witnesses, like jurors and court officers, owe a duty to the state to aid in the due administration of government for such compensation as the law provides. The least tendency to the

contrary should not be tolerated, however innocent the claimed intent. *State v. First Bank of Nickerson, supra.*

In view of our holdings, it is not necessary to discuss the other assignments of error raised by appellants.

We must therefore conclude that the verdict of the jury is clearly against the weight and reasonableness of the evidence, and that the contract sought to be enforced is against public policy. The judgment of the lower court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

LOGAN C. MUSSER, APPELLEE, V. VILLAGE OF RUSHVILLE ET AL., APPELLANTS.

FILED DECEMBER 16, 1931. No. 27868.

Municipal Corporations: STREET IMPROVEMENTS: ASSESSMENTS: VALIDITY. The methods prescribed by section 17-432, Comp. St. 1929, granting to cities of the second class and villages power to pave, gravel and improve streets are mandatory and jurisdictional, and unless the governing boards of such municipalities act within one of the three prescribed methods, no valid assessment can be made against property to pay the costs of such improvement.

APPEAL from the district court for Sheridan county: EARL L. MEYER, JUDGE. *Affirmed.*

Nichols & Johnson, for appellants.

A. C. Plantz, contra.

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and RAPER and RYAN, District Judges.

RAPER, District Judge.

This is an appeal by defendants from a judgment for plaintiff in an action by Logan C. Musser, plaintiff, against the Village of Rushville and the five individual trustees and the clerk of said village, defendants, enjoining the defendants from levying a special tax on certain lots of plaintiff for graveling streets in Rushville.

It appears from the pleadings and the evidence that on July 30, 1928, a petition signed by nine alleged resident owners of real estate abutting on and adjacent to Main street in the village of Rushville between Third and Fifth streets was filed with the village board, asking the board to create an improvement district on Main street between Third and Fifth streets, and to survey, grade and gravel said Main street, the cost thereof not to exceed 90 cents a front foot. On the same day and at the same meeting of the board, the village board passed an ordinance creating improvement district No. 11 (being ordinance No. 259) which district included that part of Main street from south line of Third street to south line of Fifth street, on which plaintiff's lots abutted. The ordinance provided that the roadways in said districts be graveled and improved, and further provided that plans and specifications and estimates of the cost of the work be secured and approved by the board of trustees, and following the completion of said engineering work, bids for the construction of the work should be "obtained by advertisement as by law required. Or the board of trustees may in their discretion do or cause to be done under their direction, or the direction of a competent engineer in their employ, all of the work necessary to be done without the calling for bids or letting of contracts;" and that the cost of the work be assessed against the real estate in said district according to benefits, but not to exceed 90 cents a front foot. This ordinance was published only one week in a weekly paper and no other notice was given as to creation of the district. No further steps were taken until May 26, 1930, when the board in regular session passed a resolution "that the chairman be authorized to enter into a contract with some one for furnishing and spreading of gravel on the five blocks of gravel that are covered by ordinances Nos. 259, 260, 270. The contractor to furnish bond in the amount of the contract to complete the contract." On July 9, 1930, without further action by the board, the chairman on behalf of the village entered into a written contract with a gravel company to

furnish and deliver for improvement district No. 11. The gravel furnished for district No. 11 amounted to $1,897.50. No advertisement for bids was made. The delivery of the gravel was completed on district No. 11 on July 17, 1930, and Mr. Curtis, the village clerk and the chairman, without any further action of the board, issued a warrant to the gravel company for $1,897.50 on July 19, 1930, and Mr. Curtis, who was also village treasurer, paid the warrant the same day. On this same day, without any action by the board, the clerk mailed to plaintiff postal cards, stating the amount of gravel taxes due on his lots and, if not paid by August 1, it would become a lien on his property and would be certified to the county treasurer. The amounts were computed at 82 cents a front foot on all the property, and the taxes not paid to the village treasurer by August 1 were certified to the county treasurer, except plaintiff's. This action was begun July 28, and a restraining order was granted that day.

Second street runs east and west through the village and was then graveled and is a part of a state and federal highway. The two blocks graveled on Main street run north and south. Second street is one block north of Third street, and Main street was then graveled from Second street to Third street. After the ordinance was passed and before the contract was entered into, the United States census disclosed that Rushville contained more than 1,000 population, but no proceedings had been taken to change from village to city organization. The village board held no meeting to equalize and levy the tax, and admitted that unless restrained, they would levy and certify the taxes for the improvement to the county treasurer. The district court found generally for plaintiff, that the improvement exceeded $500 in cost; that no estimate of expense by the village engineer was procured; that no advertisement for bids was made; and that the petition did not contain 60 per cent. of the resident owners of the abutting real estate in said district. Each of these special findings are supported by the evidence.

Section 17-432, Comp. St. 1929, grants power to cities of the second class and villages to improve, grade and gravel streets, but provides that none of the improvements shall be ordered unless by one of three procedures: First, by petition signed by 60 per cent. of resident owners of property directly abutting upon the street to be improved; second, whenever the governing body deems it necessary to make the improvement, it shall by ordinance create such paving or graveling district, and after the passing, approval and publication of such ordinance, shall publish notice of the creation of such district, if in a weekly paper, two consecutive weeks; and, third, the council or board shall have power by three-fourths vote of all members to enact an ordinance creating a paving or graveling district and to order such work to be done without petition upon any main thoroughfare that connects with or forms a part of the state highway system. The power of the board to make such improvements is circumscribed by the statute, and unless the board conforms to one of the three prescribed methods, they are without power to lawfully bind property to pay for such improvements. It evidently was not the purpose of the statute to grant unlimited and unrestricted power to the city councils and boards of trustees to improve streets.

It will be observed from the foregoing history of the proceedings that the village board cannot bring themselves under the first method, because they did not have 60 per cent. of property owners on the petition. Neither can they rightfully claim to have acted on the second method, because no notice of the establishment of the district was published for two weeks. As to the third method, it will be noted that improvement district No. 11 does not connect with or form part of a state highway.

"Powers conferred upon municipal boards by legislative charter will not be extended beyond the plain import of the language used therein." *Garver v. City of Humboldt*, 120 Neb. 132. That case further holds: "Statutes empowering municipal boards to perform certain functions

will be strictly construed, and all doubt will be resolved against the exercise of the power, rather than in favor of it."

Furthermore, there was no estimate of the proposed improvement made to or adopted by the board, and no advertisement for bids was published. These are required by section 17-119, Comp. St. 1929. The ordinance specified that should be done, but had a further provision that the board might have the work done without calling for bids or letting of contracts.

The appellants claim that under the village charter no estimate of cost is required because a village has no engineer. The ordinance required such estimate, and the villege board could employ an engineer, so it is unnecessary to decide the effect of the 1925 amendment (Laws 1925, ch. 51) to section 17-119, as applying to villages, and, besides, the village had been merged into a city of the second class.

Appellants claim that appellee is estopped to question the validity of the assessment, in that he knew the work was in progress and took no steps to prevent its completion. Estoppel in such cases may arise where there has been some irregularity in the proceedings, but where there is a failure to comply with some jurisdictional requirement estoppel will not arise. *Rooney v. City of South Sioux City*, 111 Neb. 1. Under the record as shown, no valid assessment for the cost of the graveling can be charged against plaintiff's property.

There are several other questions raised in the pleadings and briefs which are unnecessary to notice.

Th decree of the district court is

AFFIRMED.

SCHOOL DISTRICT NO. 142, HOLT COUNTY, APPELLANT, V. SCHOOL DISTRICT NO. 13, HOLT COUNTY, APPELLEE.

FILED DECEMBER 16, 1931. No. 27870.

Taxation: ASSESSMENT. A power plant consisting of powerhouse, dam, floodgates and spillway was constructed along the line

between school districts No. 142 and No. 13 in such manner that all the improvements were west of the line in No. 142, unless, perhaps, an infinitesimal portion of one corner of the powerhouse projected into No. 13. *Held*, that the doctrine of *de minimis non curat lex* applied, and that the county board of equalization abused its discretion in assessing the property in both districts and dividing the taxes equally between them.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Reversed, with directions.*

J. J. Harrington, for appellant.

Julius D. Cronin, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and REDICK, District Judge.

REDICK, District Judge.

This is a controversy between school districts No. 142 and No. 13, in Holt county, Nebraska, involving the question of the proper place of assessment of personal property of the Northern Nebraska Power Company consisting of a powerhouse and machinery and a dam across the Niobrara river. The crucial question is one of fact, that is, whether or not any of the personal property above referred to is located in school district No. 13, and this depends upon the location of the dividing line between Holt and Boyd counties, which is fixed by statute as the middle of the channel of the Niobrara river. The dividing line between the two school districts runs north and south across the river.

The powerhouse is located on the north bank of the river, about half of it being built into the bank and the other half over the river. It is about 60 feet north and south by 48 feet east and west, but does not stand square with the compass, a line from the northeast to the southeast corner of the building angling somewhat to the southwest, the dam continuing in that direction in a straight line. Immediately south of the southeast corner of the powerhouse is a concrete dam about 30 feet in length, then comes a 20-foot steel gate, then a spillway of con-

crete and steel 237 feet 6 inches long, then three gates 14 feet 10 inches each in width, and beyond that to the south a dirt dam of considerable length.

The line dividing the school districts, extended north, would pass through the powerhouse at a point 6 or 8 feet west of the southeast corner and come out of the north wall about 26½ feet west of the northeast corner, thus placing about a fourth of one-third of the powerhouse and a portion of the machinery therein contained east of the dividing line between the school districts, and it is because of this fact that district No. 13 claims that a portion of the taxes levied upon the personal property of the power company should be allocated to it. It is possible that an insignificant part of the concrete dam is east of the division line, but the great weight of the testimony establishes that all the works south of the powerhouse were west of the division line and they will be so considered.

The question was presented to the county board of Holt county sitting as a board of equalization, both parties producing evidence and represented by attorneys, and the board decided that a portion of the property was located in school district No. 13 and apportioned the taxes equally between the two districts. An appeal was taken by district No. 142 to the district court for Holt county, which confirmed the decision of the board of equalization, and the case is brought here for review by said district.

The case was presented in the district court and also in this court upon the testimony taken upon the hearing before the board of equalization, which constitutes the bill of exceptions herein. If any portion of the property, the subject of the assessment, is located in school district No. 13, the judgment of the district court must be affirmed, otherwise reversed.

As above stated, the real question for determination is the location of the main channel of the Niobrara river, fixed by the legislature many years ago as the northern boundary of Holt county, or as it existed at the time of

the erection of the dam, gradual changes being possible on account of the vagaries of the waters flowing through a sandy soil. The general features of the banks and bed of the river may be here noted. The north bank was 25 to 30 feet above the surface of the river and was composed largely of shale and soapstone; the bed of the river was sand, and the south bank of the same material, quite low; the distance between the banks in many places was more than 300 feet and waters flowed in many channels, the main channel being sometimes at one point and sometimes at another as the result of floods. At a place a quarter of a mile or more west of the dam, a tongue of low land (referred to as Whiting's) extended from the north bank to a point about half a mile south, and prior to the erection of the dam the waters flowed southeasterly around this point and then turned northeasterly until they passed under a steel bridge about 200 feet or more east of the dam, being thereto conducted by a series of riprapping on the south bank, at times ignoring these obstructions and washing out the highway south of the bridge, so that a cement bridge was put in west of the steel bridge to take care of these flood waters, since which time the main flow of the water was under the center of the steel bridge.

The real point of dispute is whether, at the time of the building of the powerhouse and dam, the main channel of the river west of the powerhouse was along the north bank, for which district No. 13 contends, or whether it was south of that bank a sufficient distance to clear the south line of the powerhouse.

About an equal number of witnesses were called by each party on this point, but it would unduly extend this opinion to recite and analyze their evidence, and it must suffice to give our conclusions from a careful study of the evidence, and the reasons therefor as briefly as may be.

The evidence for appellant, school district No. 142, is clear and specific that, at the time the powerhouse and dam were put in, the main channel of the river was at least 150 feet south of the north bank; and this is sup-

ported by the undisputed facts that there was a sandbar extending that distance south from the north bank at the time the construction of the improvements was commenced; that the powerhouse and connecting cement dam were built upon practically dry land, one-half of the powerhouse being built into the bank; that a cofferdam beginning about 30 feet west of the powerhouse and 150 feet in length extending in a southerly direction was built for the purpose of protecting the cement dam from overflow during construction, and that only the southern end of the cofferdam touched deep water; that in the building of the cofferdam they had no water to contend with for the first section; that the cofferdam was not put in until they started working beyond the sandbar and then for the purpose of protection from high water; that prior to the erection of the dam the waters came from the southwest in order to pass under the steel bridge, which fact was testified to by some witnesses of appellee as well as those of appellant. Some of appellee's witnesses testified that the main channel was along the north bank, but their evidence is not satisfactory and in some instances, in the opinion of the writer, fails to distinguish between the north bank east of the dam and east of the bridge and that portion west of the dam. In short, we are clearly of the opinion that by far the greater weight of the evidence establishes that the main channel of the Niobrara river at the time of the erection of the powerhouse was at a point 100 feet or more south thereof and that no portion of the powerhouse or dam lies within the lines of district No. 13. Upon a review of all the evidence it may be stated with absolute certainty that the entire powerhouse is in Boyd county. The main channel was estimated from 50 to 60, 100 and 150 feet in width before the dam was constructed. It would therefore follow that, even though it flowed up against the north bank, one-half (30 ft.) of the powerhouse being built into the bank, only a very negligible part, if any, would be south of the center of the channel in Holt county. If the powerhouse was 72

feet long, as said by one witness, and the river channel only 50 feet wide before the dam was built, only about 88 square feet of the powerhouse would be south of the center of the main channel. For purposes of assessment the power plant, including powerhouse dams, gates and spillways, must be treated as a unit, as it is impracticable to assess the respective portions of the plant separately.

Section 77-1415, Comp. St. 1929, provides that, where a question arises as to the place of listing and assessing personal property between two places in the same county, the place for listing same shall be fixed by the county board, and when so fixed "shall be as binding as if fixed in this chapter;" and in construing a similar section (section 42, art. I, ch. 77, Comp. St. 1905) in *Diemer & Guilfoil v. Grant County,* 76 Neb. 78, it was held that the determination of the county board would not be disturbed unless an abuse of discretion is shown.

The finding of the board was: "The property of the Northern Nebraska Power Company in Holt county, Nebraska, consisting of a dam, powerhouse and machinery across the Niobrara river, is situated in school district No. 142 of Holt county, Nebraska, and No. 13 of Holt county, Nebraska, and that the valuation for school tax purposes be equally divided between said school districts No. 142 and No. 13 of Holt county, Nebraska." The final question, therefore, is whether or not the county board abused its discretion in so holding. The proportion of the property, if any, of the power company in school district No. 13, as shown by the evidence in this case, is so infinitesimal as to call for the application of the doctrine of *de minimis non curat lex.* It would be manifestly unfair and unjust under these circumstances to allocate to district No. 13 one-half of the taxes upon the property of the power company, and we are forced to the conclusion that the board was guilty of an abuse of legal discretion in so doing.

The judgment of the district court will be reversed and the cause remanded, with instructions to enter a decree

that the proper place of assessment for taxation of the property of the power company is in school district No. 142, and certify their action to the county board.

REVERSED.

ERWIN W. EBERT ET AL., APPELLANTS, V. ANNA M. EBERT ET AL., APPELLEES.

FILED DECEMBER 16, 1931. No. 27916.

Deeds: VALIDITY. Evidence examined and *held* to be insufficient to establish (1) mental incompetency of the grantor to execute the deeds in question; (2) undue influence in their procurement; and (3) a constructive or resulting trust in favor of the heirs of the grantor.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Good, Good & Kirkpatrick and *E. S. Schiefelbein,* for appellants.

Max V. Beghtol and *Woodruff & Gard, contra.*

Heard before GOSS, C. J., EBERLY, DEAN and PAINE, JJ., and REDICK, District Judge.

REDICK, District Judge.

Action in equity to set aside two deeds executed by Henry P. Ebert to his second wife, Anna M. Ebert, conveying a house and lot in Lincoln and a farm of 160 acres in Dawson county. Plaintiffs Erwin W. and Arley S. Ebert and Oral M. Berlin (nee Ebert), children of grantor, claim that the deeds were executed at a time when their father was mentally incompetent and were procured by undue influence of the defendant and upon her promise that after grantor's death she would hold the real estate in trust for the appellants as heirs at law of the deceased, thereby raising a constructive or resulting trust in favor of the plaintiffs. These claims were put in issue by the answer; the case was tried in the lower court, and resulted in a decree generally against plaintiffs and for de-

fendant, but upon condition that defendant quitclaim to plaintiffs all interest or claim she might have to certain property in Saunders county, Nebraska, being all the remaining property belonging to the deceased, consisting of a two-sixths interest in a 200-acre farm, and a like interest in a house and lot in Wahoo, and a claim against the farm in the sum of $5,000. Plaintiffs appeal to this court.

For a clear understanding of the questions submitted, it is necessary that we state the situation of the parties at and before the execution of the deeds in question. Henry P. Ebert was a farmer and lived with his first wife on the 200-acre farm in Saunders county, which came to her by inheritance, and which, upon her death, descended to the three children and Henry, her surviving spouse, Henry's interest being an undivided two-sixths; he also had two claims for improvements on the property duly allowed by the probate court in the sum of $5,000; he also owned a house and lot in Wahoo; he was also the owner of personal property and farm machinery which was afterwards purchased by his son Erwin for the sum of $1,200 for which he gave his note; also an improved farm of 160 acres in Dawson county, and a five-room frame house and lot in Lincoln (the property in controversy); also personal property consisting of building and loan stock in the sum of $3,100, and note of a relative for $3,500.

Defendant Anna M. Ebert was a widow living in Kansas City, Kansas, where she owned a house and lot which had been the family homestead, and where she conducted a boarding-house and took care of her father, who lived with her; she also owned another small house and lot in Kansas City, Kansas; the value of these properties is not disclosed by the evidence but they were incumbered to the extent hereinafter stated. She had taught school for twelve years.

Some time in 1926 Henry P. Ebert met the defendant, then Mrs. Jones, on a visit to his sister, who was working for the defendant in the boarding-house, and this ac-

quaintance ripened into a friendship and correspondence between them, and in the spring of 1926 Henry went to Denver to meet the defendant, who was there on a vacation, remaining about one week. He visited defendant again at her home and proposed marriage, but defendant refused on the ground that she had to take care of her invalid father. Finally, in January, 1927, Henry invited her to come to Saunders county, where his daughter Oral and his son Erwin were to be married. She accepted the invitation, the marriages took place, and afterwards, upon the same day, Henry and defendant were married and went to Kansas City, Kansas, to live at her house. At this time Henry was 58 and defendant 53; Oral was 27, Erwin 25, and Arley 19. Arley went to school in Chicago for three months, and then went to live with his father and defendant, and continued to do so until this suit was brought, paying his board and lodging and being taken care of by the defendant while ill after an operation, and at another time, for several months. The relations of the families were always pleasant and affectionate, as evidenced by visiting back and forth and by a number of letters in evidence. Henry made his wife an allowance of $50 a month until the fall of 1927 and for an indefinite period thereafter $100 a month, and in the summer of 1928 paid off a mortgage upon Mrs. Ebert's house in the sum of $1,100. He had no occupation, but helped run the boarding-house—washing dishes, going after groceries, and making himself generally useful.

In August, 1928, Henry became ill, and in the latter part of that month suffered an apoplectic stroke which resulted in partial paralysis of his right side and affected his speech; he was confined to his bed several weeks, being taken care of by his wife. On September 10 following he transferred to his wife the building and loan stock in the sum of $3,100, a note for $3,500, and Erwin's note for $1,200, this being all the personal property he then owned, having on September 4 previously given his wife a check for $257.34, his balance in the bank at Ithaca. The validity

of this transaction is not in question in this case, but is the subject of another lawsuit pending in the federal court. After his stroke the bank account was kept in the name of defendant.

Prior to October 12, 1928, Mrs. Ebert, at the request of her husband, as she claims, after writing Erwin for them and receiving no answer, procured two deeds from the bank at Ithaca containing the description of the Dawson county farm and the house and lot in Lincoln, and had deeds prepared from her husband to herself conveying those properties, and on that date procured the attendance of a notary (Craig) to witness the signature and take the acknowledgment of the deeds, but Henry said he was not ready to sign them and they were not then signed. On October 29 following another notary, Mr. Berry, was called by Mrs. Allen, who had prepared the deeds, at the request of Mrs. Ebert, and at that time the deeds in question were signed and acknowledgment taken and were recorded late in November.

After the first ten days Henry's health continued to improve, with occasional set-backs, so that he was able to get around the house, and in the spring to be taken out riding, and during the summer to visit his children in Saunders county, until about a month before his death, which occurred November 28, 1929.

1. The evidence as to the mental condition of Henry at and about the time of the execution of the deeds is not sufficient in our opinion to establish incompetency. It consists of evidence by the three children that after his stroke he lost control not only of his motor faculties, but also of his emotional faculties; that he could not use his right arm, and when attempting to speak would burst out crying or laughing without any apparent reason other than his condition; and the testimony of Dr. Williams in answer to a hypothetical question, based upon the evidence of the witnesses, that the patient had impaired mental faculties and would not have normal powers of resistance, that one in the condition described would have "an involvement

of his intellect to a degree that is highly questionable and you would have to know the patient the moment he signed the document or made the transfer" to form an opinion of his competency at that particular time. He expressed no opinion as to Henry's competency when the deeds were signed. On the other hand, Dr. Barney, who attended the patient from the time of his seizure until his death, states that he did not observe any conditions of emotional disturbance until November of 1928, and that during all the time prior thereto he considered the defendant mentally sound and perfectly competent to transact business. Miss Showalter also fixes the crying spells as beginning the latter part of November, 1928. A number of nonexperts gave their opinions, of varying weight, to the effect that he was mentally sound. From a careful consideration of all the evidence upon this question, we have come to the conclusion above stated.

2. Upon the issues of undue influence and constructive trust, plaintiffs rely upon what is claimed to have been an unnatural disposition of Henry's property, and which is said to be the result of his mental weakness; threats of his wife, and promises made by her to distribute the property after his death according to the rules of intestacy. The evidence upon these questions is so interwoven that they may well be considered together. Arley testifies that in the summer of 1927, from an adjoining room, he overheard a conversation between Henry and his wife in which the latter suggested to Henry that his children were out of their affairs and they need not consider them, to which Henry replied, "Yes, but these children are the ones who have helped me all through my life to get what I have and I have denied them a good many privileges they could otherwise have. I don't feel we need to spend any more than the income on this and leave them the principal after we are through with it." At another time prior to the transfers, Arley testifies defendant said in his presence to Henry: "If you don't want me to have protection by giving me enough property as collateral to protect myself

you will have to turn it over to one of the kids or all of them and they will have to be responsible for your care." And again: "Well, if he feels that way about it I don't see how I can assume responsibility for his care." And Arley testified that in the spring of 1929, Henry said to defendant, "If you will just give me my property, or money, I will be glad to take care of myself," and defendant replied, "When you get all packed up and ready to go I will give you what you want." Miss Showalter testifield that she heard defendant tell Henry, in the spring of 1929, that, if he could think of any way to manage it, she was willing that he take the money he had given her and he could provide for himself in whatever way he wanted to; to which Henry replied, "No, no; I don't want to go away." There was also testimony by Mrs. Allen and the notary who acknowledged the deeds that at that time Henry said that he "didn't know why he had to do that to get protection." Mrs. Allen also testified that when she was asked to prepare the deeds defendant said, "It was to take care of him during his illness;" that she made some correction in one of the deeds after it was signed, defendant saying she "didn't want to go through all that again."

It is claimed by plaintiffs that the greater part of this testimony is undenied by the defendant. She did, however, specifically deny making any threats that if he did not sign the deed he would have to leave home and she would not take care of him, or that he would have to go back to the children or to a hospital, or making such statement to Mrs. Allen. Defendant testified that Henry said about the deeds that "he wanted to get his affairs arranged so I could take care of it;" "I do not want Erwin to take care of my affairs. We can take care of our own." She also testified that there was never any talk of reconveyance to Henry or anybody else; he never said anything about the children having any interest after my death except as I should decide; "he knew I was friendly toward the children and wanted to treat them right." Miss Showalter testified that early in the fall, after Henry was

stricken, she overheard a conversation between Arley and Henry in which Arley said: "Well, Dad, it is all right with us, you give her what you think she ought to have and don't worry about us children. We will get along all right." Mrs. Allen testified that defendant told her that "the deeds were to take care of him during his illness." In December, 1928, the sum of $2,100 out of the building and loan stock was paid on a mortgage on the boarding-house property. The $3,500 note was paid October, 1929. Rent of the Dawson county farm for 1928 was $1,000, and was used up in his care; the 1929 rent was used to build a barn, pay interest, taxes and expenses, about $1,100. Arley testified that on March 13, 1929, at his father's request and dictation the following instrument was prepared by him:

"Will of H. P. Ebert

"To whom it may concern:

"To Anna M. Ebert, my wife, I bequeath all of my tangible property and my property in Lincoln, Nebraska. I want my property in Dawson county, Nebraska, to be distributed according to the state laws of Nebraska.

"Any equity I hold in the property in Saunders county, Nebraska, I bequeath to my three children.

"This may not be a legal document but I believe it just and right and trust all parties concerned will respect my wish.

"(Signed) H. P. Ebert."

This instrument was put in a sealed envelope and placed in the bank and defendant had no knowledge of it until after Henry's death. Of course, it could not affect the deeds previously signed, if they were valid, but merely expressed Henry's state of mind when executed. Shortly after administration proceedings were started, February, 1930, and before this suit was begun, defendant deeded the property in controversy to one Ora Cox Wilson of Lincoln, Nebraska. This was simply for convenience, the grantee stating "she wanted me to keep in touch with it;" "to look after her property." "She was in Kansas and I was here and I could look after it better than she could."

With reference to the final execution of the deeds in question, the testimony was as follows: Berry, the notary, Mrs. Allen and defendant were the only persons present. Berry testified: "When I asked him if he understood what he was signing he said he did. He made some remark about not knowing why he had to do it for protection, but I didn't pay any attention." The deed was signed by mark with his left hand. "He could not use his right hand." I acted at the request of Mrs. Allen; Mr. Ebert signed of his own will and accord. Mrs. Ebert remained in the other part of the double room.

Loleta Allen testified she was in the real estate business and drew the deeds early in the fall of 1928 at the request of Mrs. Ebert; she signed Henry's name and he made the cross; signed in his bedroom, Mrs. Ebert was in the adjacent room; Henry said he did not know why he had to do it to get protection; that was all that was said, except Berry asked if he acknowledged the deeds. Mrs. Ebert testified that after the deeds were signed Henry handed them to her, saying, "These are yours; have them recorded;" that she had talked with Arley about the deeds before and after they were executed; that she told him what conveyance had been made to her. This is practically all of the pertinent testimony at the time the deed was signed. Mrs. Kepner testified that she was present on October 12 when Henry declined to sign the deeds, and that after the notary had gone she had a conversation with Henry in which he said that he didn't know just what he wanted to do, and Mrs. Ebert told him that she didn't want him to do anything that he did not want to do himself, and he said "that he wanted to fix things for her and didn't see how, but he asked me how we had our property, and how we had things fixed;" that he wanted to avoid probate court proceedings; talked about the laws of different states; that at other conversations he spoke bitterly about court trials and squandering money in litigation.

The execution of the deeds in question, or rather the transfer of the property to defendant, was discussed by

Arley and defendant prior to their execution; defendant testifying that Arley said, "It was all right." Arley's evidence as to this conversation was: "She asked me in regard to the transfer of these deeds, what I thought about it, just a sort of general opinion. I says, 'It looks to me as though it is the right thing to do if you really need it for his care.'" Also, that they discussed the effect of the transfers in the event of her death before her husband, and that defendant said: "Well, that will automatically revert back to you children then." Also that she said: "In case of his death before it is used for his care and funeral expenses, etc., I will make a proper distribution, avoid the probate court." Mrs. Ebert also testified that in a conversation with her husband "he said that property was to take care of the expenses and to take care of me after he was gone," and that he never said anything different; that he never told her to make any other disposition of the property covered by the deeds after his death, but that the property was to be hers absolutely; he also said that his claim against the Saunders county home should be canceled, and that the children should have that home and the property in Wahoo. Mrs. Gooch testified that at one time Henry said that he had "paid his children for what he thought they had been worth to him in making this farm." It appears in the evidence that Henry paid Erwin $50 a month after he was of age for work on the farm. January 2, 1930, Erwin wrote a letter to defendant asking in what condition his father left his property and inclosed $72 interest on his $1,200 note, promising to pay the remainder shortly. In response to that letter, on January 14, 1930, defendant wrote Erwin as follows:

"After your father had the trip last summer and we all got home safely and things readjusted for his comfort and etc., he seemed so much more contented and satisfied about everything and everybody, which made things a little easier for me to handle and wade through. He did not want a will but wanted you three children to have the

home place free and clear, which means the cancelation of the note or mortgage for $5,000 and the release on my part, of any claim or interest, that the law might give me, if probated.

"In November of 1928 he deeded to me the Dawson county farm and small property in Lincoln, which he wanted me to have to take care of myself, knowing there would be no one to give me the tender care he received during his long illness.

"When I asked him how he would like me to make the final adjustment should I pass out suddenly or not need all of it, he said I could fix it so his share in what was left of his property, go to you three children and the rest for me to dispose of as I felt I wanted to do.

"I'm sure he wanted to be fair with us all and pray that all will be satisfactory with you children.

"I am going to have things put in legal form just as soon now as I can get to it, so you children will get what your father wanted you to have should something overtake me. I intend to carry out his wishes in detail as nearly as it can be done.

"When you find out what is necessary to do, to help clear the 'home place,' so you can have a clear title to it, let me know and I'll be glad to do it. You will need this, should you ever want to make a transfer to any one. There is nothing that needs probating or mixing up with the courts, which always saves a good per cent.

"I'm sure your father had this in mind when he ask to have things done in this way.

"I want you to know, too, that I am and always shall be interested in you all and anxious for your well being and success. I'm sure you will know this as the years go by. Please let Oral read this, too, for it is hard for me to get so much writing done. Hoping this finds you all well and happy again, lovingly.

"Mother."

It is upon this letter that appellants chiefly base their claim of a constructive trust. It is contended that the

letter is in direct conflict with the testimony of defendant that the transfers to her were absolute, especially that paragraph reading as follows: "When I asked him how he would like me to make the final adjustment should I pass out suddenly or not need all of it, he said I could fix it so his share in what was left of his property, go to you three children and the rest for me to dispose of as I felt I wanted to do." This undoubtedly refers to the properties conveyed, but does not appear to us to be inconsistent with her testimony that the deeds were made to her unconditionally. A fair construction would seem to be that the property was given to her for her use and if anything was left she could fix it so his share of what was left would go to the three children. The most that can be made out of this paragraph is that he wished such portion of the property as was not needed by the defendant during her life to go to his children, and trusted her to make such disposition of it.

This construction is borne out by the language later on where she speaks of "having things put in legal form." What "form" she meant is not disclosed, but it is likely she intended to make a will to the children. If this was her purpose and constitutes a trust for the benefit of the children the time has not yet arrived to enforce the same.

As to the deed to Wilson, a woman as intelligent as defendant would hardly expect such a conveyance would be effective to prevent recovery of the property by the heirs if otherwise entitled. Mrs. Ebert was not asked about this matter, so the only explanation of it is that given by Ora Cox Wilson. It seems to have had the effect, however, of getting notice to defendant of these suits through service on Wilson, which otherwise might have been by publication.

We are strongly persuaded by the evidence that the defendant is a woman of excellent character; that she was very fond of her husband and, especially after his stroke, gave him all the care and attention which a dutiful and affectionate wife would do, the evidence upon this question

being undisputed; that she was most friendly and affectionate in her treatment and consideration of his children and had a natural appreciation of their claims upon the bounty and estate of their father; that after her husband's seizure she felt the necessity of taking measures with reference to his property which would enable her to minister to him and supply his needs in case his illness would be prolonged, and for which her own financial condition would be inadequate. We are not concerned with the transfer of the securities, except as that transaction may serve as an aid in determining the real nature and purpose of the conveyances in question. With reference to these there seems to have been no attempt on her part to conceal the transaction from the plaintiffs. She wrote to Erwin for the papers so she could get the description of the Dawson county farm and the Lincoln lot. She talked the matter over with Arley before the deeds were signed, and had the deeds recorded within a month thereafter. If she had procured the deeds secretly and withheld them from record until after the death of her husband, a quite different aspect of the transaction might be presented. Her frank avowal of the desire of her husband that the children should have the Saunders county property free from her husband's $5,000 claim against it is another indication of her recognition of their proper claims. If she had been a woman of the character sought to be painted by the plaintiffs, it is quite probable she would not only have insisted upon retaining the property she received, but would also have claimed her interest in the remainder of her husband's estate.

While there is evidence which, considered alone, would warrant an inference that defendant made use of the situation to persuade her husband to execute the deeds, the evidence as a whole falls far short of establishing such undue influence as to overcome the will and judgment of the grantor. That he was desirous of making some provision for his wife during his lifetime is indicated by the document subsequently executed, called a "will," which seems to ratify his previous transfer of his securities and

of the Lincoln property. The fact that, at that time, he desired the Dawson county farm to descend according to statute indicates a change of mind, but carries no implication derogatory to the validity of his former decision.

We are unable to conclude from the evidence that the transfer of the securities and real estate to defendant was of such an unnatural character as to stamp it fraudulent. The values of the respective parcels of real estate are not disclosed by the evidence. The most we have is, on the one side, $7,500 in securities, the Lincoln lot and the Dawson county farm, and, on the other side, a third interest in the Saunders county farm, a house and lot in Wahoo, a claim for $5,000 and accrued interest from 1924, and the distributive share of the widow in that property. When we consider the financial situation of the husband and wife, the husband's physical condition resulting from a stroke of paralysis, and the uncertainty of the duration of his disability, which in fact continued, with a few intervals, for more than a year, we are driven to the conclusion that, though the provision for his wife may appear somewhat liberal, the mental condition of the husband being such that he was competent to make it, and the influence of the wife to that end not being of such controlling character as to amount in law to a substitution of her will for that of her husband, we do not feel justified in setting the transaction aside.

With reference to the question of a constructive trust, we are of opinion that the most that can be claimed from the evidence is a promise by defendant that what was not needed for her support during her life should go to the children of her husband. The principles of law governing the determination of these cases are well understood; but, after all, the decision of each case depends upon its particular facts, and while we have read many of the cases cited by the plaintiffs, we do not deem it necessary to enter into a discussion of them.

It follows that the decree of the district court is correct and is

AFFIRMED.

EARL CLINE, APPELLEE, V. ALBERT HOLDREGE, APPELLANT.

FILED DECEMBER 18, 1931. No. 28023.

1. **Libel and Slander:** WORDS ACTIONABLE PER SE. Spoken words are actionable *per se* if they impute to the person of whom they are spoken the commission of a crime for which he may be punished by imprisonment in the penitentiary.
2. ———: PRIVILEGED UTTERANCES. To make privileged the utterance of words actionable *per se*, the person uttering them must believe them to be true and have reasonable grounds for such belief.

APPEAL from the district court for Franklin county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

Bernard McNeny, L. A. Sprague and *J. S. Gilham,* for appellant.

F. J. Munday and *Leon W. Samuelson, contra.*

Heard before ROSE, GOOD, DAY and PAINE, JJ., and LESLIE, District Judge.

PER CURIAM.

This is an action for slander in which plaintiff recovered judgment for $225, and defendant has appealed.

In the petition it was alleged that defendant, in the presence of others, falsely accused plaintiff of selling a mortgaged hog without the consent of the mortgagee. In his answer defendant admitted that there was a controversy between the parties concerning a hog sold by plaintiff, and averred that previously plaintiff had mortgaged a hog to defendant which the latter believed was the one sold by plaintiff; that defendant insisted that the hog so sold was the one described in the chattel mortgage, and that he was entitled to the proceeds of the sale. Defendant denied the other allegations of the petition.

Defendant, by pleading facts in mitigation, or, as he contends, a qualified privilege, thereby confesses the utterance of the charge. Such a plea is in the nature of confession and avoidance.

Defendant insists that the utterances, if made as

charged, are not slanderous *per se*, and, since no special damages are pleaded by plaintiff, that there could be no recovery. He argues that the words used do not impute a completed crime, but impute, at most, an intention or attempt to commit a crime.

The record, we think, demonstrates the fallacy of this contention. Plaintiff had sold a hog to a dealer; a price per pound had been agreed upon, the hog weighed and delivered, and plaintiff was waiting to receive his check in payment when the controversy arose. Defendant in his answer alleged the sale of the hog by plaintiff. The charge amounted to a present sale of mortgaged property without the consent of the mortgagee. By our statute, the sale of mortgaged chattels, without the written consent of the mortgagee, is an offense, punishment for the commission of which may be imprisonment in the penitentiary.

The rule generally recognized is that, "in case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable." 36 C. J. 1193. In *Herzog v. Campbell*, 47 Neb. 370, it is held: "Words spoken imputing an indictable offense are actionable *per se*, and no special damage need be proved." See, also, *Pokrok Zapadu Publishing Co. v. Zizkovsky*, 42 Neb. 64.

It is evident that if the charge had been true, plaintiff would have been liable to indictment or prosecution on an information, and might have been punished by imprisonment in the penitentiary and been subjected to infamous punishment. It was properly held by the trial court that the words were actionable *per se*. There was evidence from which the jury could properly find that the utterances were made substantially as charged and in the presence of others, and that the charge was false.

Defendant argues that he was privileged to make the charge because he believed it to be true and owed a duty to inform the purchaser of the hog, for the purpose of preventing the perpetration of a fraud on himself and such purchaser.

Mere belief that one has committed a crime is insufficient to justify one in making the charge. He must have reasonable grounds for the belief and can make the charge only to one interested in the subject-matter. It appears that the mortgage held by defendant was executed two weeks previous to the time of the slanderous utterances, and described a spotted hog weighing 200 pounds, while the hog sold by plaintiff was red and weighed 375 pounds. Defendant saw plaintiff hauling the hog to market and assumed that it was the one on which he held a mortgage. A most casual inspection by defendant would have been sufficient to satisfy him, or any reasonable person, that the hog which plaintiff sold was not the one described in the mortgage. Defendant did not have reasonable grounds for believing the charge true.

Defendant has assigned error in the giving and refusal of instructions. We have carefully examined the charge given and the request for instructions refused and find no error prejudicial to defendant. In fact, the charge was more favorable to defendant than the facts and circumstances warranted. Other assignments of error have been examined and found to be without merit.

No error prejudicial to defendant has been found. The judgment is

AFFIRMED.

JOHN M. DARLING ET AL., APPELLEES, V. FRANK S. DARLING ET AL., APPELLANTS.

FILED DECEMBER 18, 1931. No. 28024.

1. **Wills: PROBATE: PROMISE TO CONTESTANT: CONSIDERATION.** Where there is opposition to the probate of a will, made in good faith, an agreement not to contest same is a valid consideration for a promise on the part of one interested in sustaining the will.
2. **Executors and Administrators: MORTGAGE: FORECLOSURE: PARTIES.** Where the executor has made a final settlement of an estate and delivered a note and mortgage to the legatees as their property, they are proper parties to maintain a foreclosure suit.

APPEAL from the district court for Boone county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

G. N. Anderson and *W. J. Donahue,* for appellants.

H. C. Vail and *Kemp & Brower, contra.*

Heard before ROSE, GOOD, DAY and PAINE, JJ., and LESLIE, District Judge.

DAY, J.

This is a suit in equity to foreclose a mortgage and distribute the proceeds of the sale. From a decree of foreclosure and a distribution of the proceeds, as sought by the plaintiffs, the defendants appeal.

The mortgage involved in this case was executed November 1, 1918, to John J. Darling, father of the principal parties hereto, and secured a note for $13,500. John J. Darling died August 23, 1921, a resident of Nance county, where his last will was probated in November, 1921, with the final decree being entered September, 1923, assigning the property of the estate in accordance with the will. The only property of the estate of interest to us is the $13,500 note and mortgage.

During the administration of the estate, all the children of John J. Darling, except Herbert Darling, signed a note for $3,600, payable to John H. Kemp, the proceeds of which were used to pay debts and a bequest to Herbert of $100 as provided by the will, and the $13,500 mortgage was assigned by them as collateral security for the loan. This loan has been almost paid and does not complicate this case, since all parties admit that his claim is superior to all others.

The plaintiffs, John M. Darling, Carrie M. Gress, Anna Pearl Gress and Hattie E. Cooper, allege in their petition that they entered into a written agreement between themselves and with Frank S. Darling, defendant, comprising all the heirs, devisees and legatees of John J. Darling, deceased, except Herbert, on the 10th day of November, 1921, to allow the will to be probated and thereafter to

divide and distribute the estate as to them by giving $500 each to Frank S. Darling and Hattie E. Cooper and dividing the remainder of the estate share and share alike to all of the heirs except Herbert, who was to get the bequest provided by the will. The defendant Frank S. Darling subsequently acquired and now owns the equity of redemption in the mortgaged property.

There was a written agreement entered into relative to the division of the property among the heirs. The preponderance of the evidence establishes the existence and terms of such an agreement. The agreement involved the interest of the five children, who are parties to this suit. Three of them, who were left small bequests by the will, testified as to the agreement. Hattie E. Cooper, a daughter, who with the son Frank S. Darling, was to share most of the estate, testified to the agreement. Her testimony was against her own personal interest. The attorney for the estate testified that he prepared the agreement; that the terms of the agreement were as alleged by plaintiffs; that it was signed by all the parties; that it was delivered to him and put away in his office; that he does not know where it is; that he has searched for it and he would say that it was lost. The defendant Frank S. Darling testified that there was an agreement, but it was not signed and the terms were not as claimed by the plaintiffs. However, his testimony is much weakened by the sworn property statement to the First National Bank of Fullerton, which was introduced in evidence. This was made February 3, 1930, and he stated therein that he had a "one-fifth interest in J. J. Darling, Est.," which is exactly his interest under the terms of the contract alleged by the plaintiffs. There is other testimony which is cumulative and corroborative which it is unnecessary to discuss in detail. It suffices to state that no other finding of fact would be possible except that the agreement was entered into as claimed by plaintiffs.

There was ample consideration for the agreement. Immediately upon the death of the father, John J. Darling,

the five children here involved met and the will was read to them. As heretofore stated, the will left comparatively small bequests to three of them and the bulk of the property to plaintiff Hattie E. Cooper and defendant Frank S. Darling. The plaintiffs, including Hattie E. Cooper, testify that there was dissatisfaction upon the part of her brother and two sisters who were left small bequests. There was some conversation about the competency of the father to make a will by reason of his mental condition at the time. Two of the children of the deceased discussed a contest of the will. The testimony is that the foregoing agreement was made as a settlement with the dissatisfied heirs. Even the defendant Frank S. Darling testifies that there was an agreement to divide the property in a manner different from the provisions of the will. There is no question presented here except whether or not the heirs at law and legatees under a will can settle their controversy, thereby avoiding litigation. Where there is opposition to the probate of a will, made in good faith, an agreement not to contest same is a valid consideration for a promise on the part of one interested in sustaining the will. *Grochowski v. Grochowski*, 77 Neb. 506; *In re Estate of Panko*, 83 Neb. 145. The defendant Frank S. Darling was interested in sustaining the will, the agreement gave him more than he would have received as an heir had the will been defeated, which was a sufficient consideration to render the contract valid.

Two other contentions of the appellants have not been overlooked. First, it is urged that the action is prematurely brought for the "plaintiffs have no right, title, interest, claim, or demand in, to, or against the mortgage or the proceeds to be derived therefrom, until after they have paid to Hattie E. Cooper and to Frank Darling each the sum of $500." Hattie E. Cooper is not complaining and appellant Frank S. Darling is not prejudiced thereby because the decree of the trial court awards him $500, as it also does Hattie E. Cooper, to be first paid from the proceeds. Secondly, as to the right of the plaintiffs to prose-

cute this action; they are the equitable owners of an undivided four-fifths and the defendant of an undivided one-fifth of this note and mortgage, subject to the payment of $500 to Hattie E. Cooper and $500 to Frank S. Darling in accordance with the agreement. In addition, the defendant Frank S. Darling is also the owner of the equity of redemption. All the parties to the agreement are parties to this suit. Who can question their right? Not the creditors of the estate because they have been paid; not the other beneficiaries under the will because their bequests have been paid; and not the defendant as owner of the equity of redemption because he bought it subject to the mortgage. There was a final settlement of the estate, the note and mortgage were delivered to the heirs, who (defendant Frank S. Darling included) assigned it as collateral for a loan. The defendant Frank S. Darling cannot complain in this respect because he was a party to the agreement and all the transactions relative thereto. The plaintiffs were proper parties to maintain the action. This view finds support in the following cases: *Walter v. Wala*, 10 Neb. 123, and *Plummer v. Park*, 62 Neb. 665.

As a résumé, we find that there was an agreement as to the division of the assets of the estate between the parties; that the contract was executed for the purpose of avoiding objections to the probate of the will, which constituted valid consideration therefor; that the suit was brought by the proper parties, and that equity and justice prevail in the judgment of the trial court, which should be and is

AFFIRMED.

IN RE ESTATE OF SARAH C. BLACK KULP. NEBRASKA MASONIC HOME, APPELLEE, V. FRANK E. KULP ET AL., APPELLANTS.

FILED DECEMBER 18, 1931. No. 27979.

1. **Wills: IMPLIED REVOCATION.** Legacies of $500 each were bequeathed to four nephews of testatrix, to be paid out of the

proceeds of sale of certain lands devised to executors for that purpose, the balance of said proceeds to be divided equally between two sisters and two other nephews. The proceeds of sale of certain other land were bequeathed to the Masonic Home of Plattsmouth, Nebraska. Subsequently testatrix sold and conveyed all of said lands. *Held*, that such sale accomplished a revocation *pro tanto* of the will and that the above bequests and legacies failed.

2. ———: ———. An implied revocation of a will should not be permitted to destroy provisions thereof which are independent and capable of execution; its effect should be to destroy only such provisions as are inconsistent with the general scheme of the testator as indicated by the language of the whole will.
3. ———: EQUITABLE CONVERSION. Where lands are devised to executors to be sold and the proceeds divided between certain persons named, there results an equitable conversion of the lands into personalty, but such proceeds will not pass to the residuary legatee, where the language of the will clearly demonstrates that such was not the intention of the testator; they will be treated as property not disposed of.
4. ———: IMPLIED REVOCATION. Legacies to be paid out of the proceeds of lands to be sold by executors, having been adeemed by implied revocation of the will resulting from the sale of such lands by testatrix, cannot be paid as such out of the proceeds of such sale, as such application would in effect make a new will.

APPEAL from the district court for Otoe county: JEFFERSON H. BROADY, JUDGE. *Affirmed as modified.*

Pitzer, Tyler & Peterson, for appellants.

D. W. Livingston, F. H. Woodland, William C. Ramsey and *Lewis H. Smith, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and REDICK, District Judge.

REDICK, District Judge.

Appeal from the district court admitting to probate the will of Sarah C. Black Kulp, deceased. The only question presented is whether or not the will was revoked by implication by reason of a change in circumstances of the testatrix.

The will consists of the original testament and three codicils. At the time of its execution testatrix was the owner of 240 acres of land which, with improvements upon one of the 80's, was of the value of about $15,000, and personal property in the amount of $1,500 consisting of a farm mortgage.

By paragraphs 2 and 3 of the will bequests are made to the executors, $200 and $300 respectively, to provide care for the graves of testatrix' father and mother and the family burial lot; by paragraph 5 a bequest of $5 each to a nephew and niece. By paragraph 6 and codicils certain legacies were given to four nephews in the sum of $500 each. For the payment of all the above bequests, by paragraph 7 she gave and bequeathed to her executors in fee simple 160 acres of land, which included the improvements, with instructions to sell the same and pay the legacies from the proceeds; the remainder of such proceeds to be divided equally between her two sisters and two other nephews; as to the nephews such proceeds were to be held by the executors upon certain trusts in their favor.

By the eighth paragraph of the will it was provided as follows. "All of the personal property of my estate (but not including household furniture and personal effects) remaining after the payment of costs and expenses of administration of my estate and any charges of administration of my estate, and all the following described real estate, to wit: (then follows a description of 60 acres, to which 20 acres was thereafter added by codicil, being the remainder of her real estate not theretofore disposed of) I give, devise and bequeath to my executors hereinafter named, and to the survivor of them, in trust, however, and with these powers and conditions: To sell said real estate * * * and to pay over the proceeds arising from said sale, together with whatever amount remains in their hands from the personal property of my estate," to the trustees of the Nebraska Masonic Home located at Plattsmouth, Nebraska.

By the ninth paragraph the absence of any bequest or

provision for her husband, Frank E. Kulp, is explained because of a mutual understanding between them that neither would claim any rights of ownership or management in the property of the other. Her husband, Frank E. Kulp, and William H. Pitzer were nominated as executors. The will was dated November 20, 1917, and the last codicil September 17, 1926.

In August, 1926, testatrix began negotiations for the sale of all of her real estate, which resulted in a contract of sale for the price of $15,000, $5,000 cash and a purchase money mortgage for $10,000, and in fulfilment of such contract, February 23, 1927, testatrix executed a deed for said land. Two thousand dollars of the principal of the mortgage had been paid. Based upon the sale price, the value of the lands to be sold for the benefit of the Masonic Home was about $3,000, and that of the remaining 160 acres, with improvements valued at $5,000 to $6,000, was about $12,000.

At the death of testatrix her estate consisted almost exclusively of securities to the amount of about $18,000, being $8,000 remaining of the purchase money mortgage, other farm mortgages and a note of her husband for $502.29, aggregating $10,202.29. A portion of said securities represents an investment of the cash payment on the sale of the land. The legatees, except the Masonic Home, and the executors appeal from the decree admitting the will to probate.

The question for determination is whether or not the sale by testatrix of all of her real estate which had been devised to her executors to be sold and the various legacies paid out of the proceeds operated as a revocation of the will.

By section 30-210, Comp. St. 1929, specific modes by which a will may be revoked are provided, but with the exception that "nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the conditions or circumstances of the testator." What changes in conditions or circumstances will operate

as a revocation are not defined, but the question is to be determined in each case by its own peculiar facts. *Baacke v. Baacke,* 50 Neb. 18. And the doctrine of revocation is not confined to those causes which would accomplish revocation at common law. *In re Estate of Bartlett,* 108 Neb. 691.

In the determination of this question, as of questions of construction and interpretation of wills, the object is to discover and give effect to the intention of the testator. The doctrine of implied revocation is based upon a presumption that by his acts such result was intended by the testator. The claim of revocation by contestants is based upon the following propositions: (1) That the testator's primary intent was to apportion among those kindred nearest to her the greater part of the estate; (2) that it was not her intention, by reducing her real estate to personal property, to bequeath all of her personal property to the Masonic Home, which would result if the will in its entirety is admitted to probate; (3) that probate of the will would defeat the intention of the testatrix to distribute the major portion of her property among her kindred; (4) that it is not possible to determine what amount of personal property should pass to the proponent, the Masonic Home, under paragraph 8, without making a new will.

At this point we deem it proper to call attention to some general principles by which the question of revocation is to be determined. As a general proposition where, by the terms of the will, a legacy is to be paid out of the proceeds of the sale of certain property and such property is not in existence at the death of the testatrix, the same having been theretofore disposed of by her, the legacy fails. *May v. Sherrard's Legatees,* 115 Va. 617. In legal terms the legacy is adeemed and the legatee is not permitted to look to the proceeds of the sale or the general assets of the estate for its payment, unless a direction so to do is found in the will. *In re Will of Miller,* 128 Ia. 612; 40 Cyc. 1205. By the direction of the will that the real

estate be sold and the proceeds divided among the legatees, the real estate was converted into personalty. *Maxwell v. Maxwell,* 106 Neb. 689; *Stalder v. Stalder,* 105 Neb. 367. The general scheme of the testator as evidenced by all the provisions of the will is to be considered; and if the will can be executed in accordance with such general scheme, notwithstanding the change of circumstances, it will be carried out as nearly as possible in accordance with the testator's intention. *Stender v. Stender,* 181 Mich. 648. If by application of the rules of law the general scheme of the testatrix will be defeated, an intention to revoke the will will be implied from such change.

Applying these principles to the will before us, we are confronted with the question whether or not, if the will is probated, it is possible to distribute the estate in accordance with the intention and general scheme of the testatrix, the proponent claiming that it can be done and the contestants taking the contrary view.

There can be no question that the intention of the testatrix was that approximately five-sixths of her estate should be distributed among her collateral relatives, she having no children of her own, and that one-sixth should pass to the Masonic Home. How may this be accomplished? It may be said that the net assets of the estate may be divided into six parts, five-sixths to the relatives and one-sixth to the Home; but this involves the determination of the respective values of the 160 acres with improvements, and the 80 acres, and places the distribution upon quite a different basis from that provided in the will, viz., the proceeds of a sale by testatrix, instead of one by the executors, which is rendered incapable of execution by the act of testatrix. *In re Will of Miller,* 128 Ia. 612; *McNaughton v. McNaughton,* 34 N. Y. 201; 1 Jarman, Wills, p. 162. It is, of course, simple enough to pay the definite legacies of $500 each provided for in the seventh paragraph, but it is impossible to determine what would have been the surplus upon the sale of the 160 acres, or the proceeds of a sale of the 80 acres, had it been made

by the executors under the instructions contained in the will. To assume that the proceeds of such sales would be $15,000 and make the distribution upon that basis, it seems to us, is entirely inadmissible, for such proceeds might have been considerably less or in excess of that amount. It seems, therefore, impossible to determine the amounts which the Home and the legatees of the surplus after payment of the specific legacies should respectively receive in compliance with the expressed intention of the testatrix. To make distribution as suggested would be, in effect, making a new will.

If under the rules of law the legacies bequeathed by paragraphs 2, 3, 5, and 7 are adeemed and destroyed by the sale of the property out of which they were specifically to be paid, then the proceeds would become a part of the general estate and, unless contrary to the manifest intention of testatrix, pass to the Masonic Home under the eighth paragraph, which would thereby acquire the entire estate to the exclusion of the relatives of the testatrix. A mere perusal of the will convinces us that no such result could possibly have been intended by the testatrix, and we conclude that an irresistible presumption arises that she would have changed her will if such effect of the sale of the lands had been called to her attention. Thus the case presents ample proof of a change in circumstances to justify the application of the rule of implied revocation. We think, however, the revocation should not effect a complete destruction of the will, but that, in so far as its provisions are not affected by the act of the testatrix from which revocation is implied, they should be executed, thereby giving effect to the intention of testatrix as nearly as possible. Election by the husband to take under the statute does not operate to revoke the will, but merely operates to cut down the amounts to be distributed as legacies. *In re Estate of Grobe*, 101 Neb. 786.

Paragraph 8 of the will bequeaths to the Masonic Home (1) "All the personal property of my estate" and (2) the proceeds of the sale of 80 acres. This last provision (2),

as we have seen, is rendered inoperative by a sale of the land; but the first (1) remains unaffected and should be executed according to the intention of the testatrix. We think "personal property" was used in a restricted sense, upon the assumption that the real estate would be sold as provided; and, therefore, the proceeds of sale of the lands, so far as they can be traced, do not fall within this description. See *Stender v. Stender,* 181 Mich. 648.

It is therefore ordered that the judgment of the district court be modified, the will admitted to probate and executed to the extent of the legacy of personal property to the Masonic Home and appointment of executors, and the remainder of will disallowed as revoked; that the remaining assets of the estate be distributed according to the law of intestate estates; that a decree be entered accordingly and certified to the county court of Otoe county.

AFFIRMED AS MODIFIED.

ELTON GILES, APPELLEE, V. JUSTIN WELSH ET AL., APPELLANTS.

LORNE AMOS, APPELLEE, V. JUSTIN WELSH ET AL., APPELLANTS.

FILED DECEMBER 31, 1931. NOS. 28059, 28060.

1. **Appeal**: FINDINGS. A finding of the trial court in a law action, based on conflicting evidence, is entitled to the same weight and effect as the verdict of a jury.
2. **Negligence**: QUESTION OF FACT. Whether the driver of a motor vehicle is guilty of more than slight negligence in failing to see an unlighted and unguarded vehicle, standing on a highway, on a dark night and when it is misting, and the driver is confronted by the bright lights of a motor car coming from the opposite direction, is a question of fact rather than of law.

APPEAL from the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Frank Kelly and *Crofoot, Fraser, Connolly & Stryker,* for appellants.

Schaper & Runyan and *Allan F. Black, contra.*

Heard before ROSE, GOOD and DAY, JJ., and FROST and MESSMORE, District Judges.

PER CURIAM.

Both of the above entitled actions arose out of a collision between an automobile owned by plaintiff Giles and a truck owned by defendant Sargent Auto Company, operated by Justin Welsh. At the time of the accident, plaintiffs Giles and Amos were in the former's car, with the latter driving. Each plaintiff had judgment, and defendants have appealed. Both actions were tried at the same time, on the same evidence, before the court without a jury, and each presents the same questions for determination.

The evidence is sharply conflicting as to some of the facts. The findings of the trial court in a law action are entitled to the same weight and effect as the verdict of a jury. All doubtful questions of fact are, therefore, resolved in favor of plaintiffs.

From the record it appears that defendant Sargent Auto Company is the owner of an oil truck, and defendant Welsh was the driver. Just before nightfall, while the truck was being driven on a highway north from Sargent, its engine became stalled and failed to operate. The truck was stopped in the traveled path on the east, or right-hand side of the highway and remained in that position for some hours. The truck was not equipped with tail lights or reflectors on the rear end. At the time of the accident its head lamps were unlighted, and there was no light of any kind displayed on the truck; nor was any one stationed at the rear of the truck to warn travelers approaching from the south, notwithstanding Welsh had with him at the time two other young men. Some time prior to the accident Welsh had, by standing in the highway and waving his arms, attempted to stop other motor vehicles. The driver of one such car coming from the south, being thus flagged or warned, drove his car past the truck and

stopped on the right-hand side of the road, 30 or 40 feet in front of the truck. The lamps on this car were lighted and threw their rays on the highway immediately in front and to the north, where there was a hill or steep grade. About 9 o'clock that night, while it was dark and misting, plaintiffs drove north on the same highway. When they were some distance from the truck they observed the light of the car parked ahead of the truck, and as they approached the place where the truck stood, a car came from the opposite direction, the light from which interfered with the vision of plaintiffs for the instant. Both plaintiffs testified that the lamps on Giles' car were burning, and that both plaintiffs were keeping a lookout on the highway, and neither of them saw the truck until their car crashed into it.

It is contended by defendants that plaintiffs were required to keep their car under such control and drive at such a rate of speed as would enable them to stop the car within the radius of their head lights, and that, not having done so, they were guilty of such contributory negligence as will defeat a recovery.

Plaintiffs failed to see the truck before the collision. Whether they were able to stop their car within the area lighted by the lamps of their car is not involved. If plaintiffs were negligent, it was because of their failure to keep a proper lookout and in not seeing the truck in time to avoid a collision.

Our comparative negligence statute (Comp. St. 1929, sec. 20-1151) provides that contributory negligence of plaintiff will not defeat recovery where the defendant's negligence is gross and the plaintiff's negligence is slight in comparison therewith. It is evident that defendants were guilty of gross negligence in leaving an unlighted truck upon the highway on a dark night, without warning of any kind to protect approaching travelers. The trial court must have determined, under the facts, that plaintiffs' negligence, if any, was slight as compared with that of defendants. Plaintiffs are entitled to recover unless

we can say, as a matter of law, from the facts disclosed, that their negligence was more than slight as compared with that of the defendants.

While plaintiffs were lawfully traveling upon the highway, they could and did see the lights of the car that was in front of the truck. They might reasonably infer that there was no obstacle between that car and their own. Moreover, as they approached near to the location of the truck, the bright lights of a car coming from the opposite direction for an instant interfered with their vision in front. Plaintiffs were traveling at a moderate rate of speed. They were keeping a lookout. They did not see the truck until the collision.

We cannot say, as a matter of law, that plaintiffs did not act as ordinarily prudent and cautious men would have acted under like circumstances. They had a right to assume that there would be no motor vehicle without a tail light upon the highway. Their vision was momentarily interfered with by the light of a car coming from the opposite direction. In the light of what occurred, it is clear that it would have been much better if plaintiffs had slowed down or entirely stopped their car until the car coming towards them had passed, but we are unable to say, as a matter of law, that it was their duty so to do, under all the circumstances. While the question is a close one, we are of the opinion that the question presented is one of fact, and that the trial court's finding is conclusive.

We find no error in the record. The judgments are

AFFIRMED.

STATE, EX REL. THURSTON J. LONG, APPELLEE, V. ARTHUR H. BARSTLER, COUNTY CLERK, APPELLANT.

FILED DECEMBER 31, 1931. No. 28175.

1. **Mandamus.** To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear.

2. ———: COUNTY CLERK: LEVY OF TAX. Ordinarily mandamus will not lie against a county clerk compelling him to levy a tax certified to him after he shall have completed the tax list duly levied by the county board of equalization and delivered it to the county treasurer. Comp. St. 1929, sec. 77-1801.

APPEAL from the district court for Otoe county: JOHN B. RAPER, JUDGE. *Reversed.*

George H. Heinke, for appellant.

Andrew P. Moran, Edwin Moran and *D. W. Livingston, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

GOSS, C. J.

The defendant appeals from a judgment granting a peremptory writ of mandamus against him.

At the regular election in the city of Nebraska City on November 4, 1930, a majority of the electors voted for a proposition submitted, to the effect that the proper officers of the city should make an annual levy on all taxable property in the city sufficient to raise annually the sum of $1,800 for a period of four years, to provide for the salary and expenses of a visiting, community nurse for the city. Comp. St. 1929, sec. 71-2407. Under this statute it is the duty of the city authorities to include the item in the estimate for expenses during the period for which adopted. The tax is to be levied and collected in the same manner as other taxes.

The city authorities failed to include this item, or any amount for this purpose, with the other city expenses required to be included in their estimate certified to the county clerk and to be levied on the last day of its sitting by the county board of equalization. Comp. St. 1929, sec. 77-1801, amended, Laws 1931, ch. 137, Comp. St. Supp., sec. 77-1801. This last day of sitting in 1931 was on August 5 and the tax levied by the board for Nebraska City purposes of course did not include this item. The

total levy for Nebraska City was 14 mills. Had this item been certified and levied it would have made a total levy of 14.35 mills. Thereupon, on August 8, 1931, this same relator brought a mandamus action against the city, its mayor and commissioners, to compel them to certify the item in question to the county clerk to be included in the taxes of 1931. On August 29, 1931, after a full trial, the court granted a peremptory writ, ordering the city officials to convene and certify the amount to the county clerk within 30 days. The respondents were denied supersedas, but appealed that cause to this court, where it is pending as No. 28192. However, on September 26, 1931, they obeyed the unsuperseded order, made an amended estimate as commanded, including the levy for the visiting nurse fund, certified it and delivered the certificate to the county clerk on September 28, 1931. Section 77-1801, Comp. St. 1929, provides: "Any such taxes * * * certified to the county clerk, after the county board shall have made such levy and before the county clerk shall have completed the tax list, shall be levied by the county clerk, if within the limit of the law, and extended upon the tax list the same as if levied by the county board."

After the county board of equalization adjourned on August 5, 1931, all taxes levied by that board were certified to the county clerk and he proceeded to compute the taxes and extend them on the tax list in suitable books, properly ruled, headed and prepared in the manner provided by law. Section 77-1806, Comp. St. 1929, requires him to complete and deliver the tax list to the county treasurer on or before the 1st day of November annually. The county clerk completed and delivered the tax list to the county treasurer on September 19, 1931. So that list did not include the levy for the purposes of a visiting nurse for Nebraska City because, as we have recited, the certificate for that purpose was not actually delivered to him until September 28, 1931.

Upon receiving the certificate, as to this additional levy, on September 28, 1931, the county clerk refused to place

the levy upon the tax books of the county. Nothing was done for nearly four weeks until on October 24, 1931, when this mandamus action was begun to compel him to enter the levy upon the tax books. He demurred to the alternative writ and affidavit upon which it was based. Upon the overruling of the demurrer, he answered, setting up most of the historical facts above stated, reciting the expenses and difficulty of revising or rewriting the lists, and pleading lack of legal authority to add the tax. Upon issues joined there was a trial to the court on October 30, 1931, and on the same day a peremptory writ was granted commanding the county clerk forthwith to enter the special levy. The final order dismissed the county treasurer and the county attorney, who were also respondents. Motion for new trial was overruled and the court denied a request to allow supersedeas. The cause was promptly appealed here and on November 5, 1931, we allowed a supersedeas. The bond was approved and filed Novembr 7, 1931. Most of the facts were stipulated.

The evidence shows that the rewriting or interlining of the tax lists, if done in that way, so as to show this additional levy, would require thousands of entries upon upwards of 200 pages, would take two or more weeks of time with the defendant's usual office force and one additional person to be hired for that purpose, with its necessary cost and interference with the usual work of the clerk's office; that the treasurer has had 11,000 tax receipts printed with the usual and necessary matter on the front and back, but not devised with a view to this additional tax; that on October 30, 1931, at the time of the trial, 170 tax receipts had already been issued by the county treasurer, receipting "in full for the following taxes for the year 1931," the printed receipt showing on the back thereof a total levy of 14 mills for Nebraska City and the front thereof showing in its proper column the amount of the tax paid by the city taxpayer. It is fair to assume that since the date of the trial several hundred would have paid their city taxes in the usual course and to avoid in-

terest. The evidence is free from proof that the defendant connived or conspired with the city authorities or anyone else to defeat or prevent the additional levy desired by relator and by those in whose interest relator acted.

"To warrant the issue of mandamus against an officer to compel him to act, a duty to do so must be imposed upon him by law; the entire scope of the writ in this respect is to compel the officer to perform his duty and cannot be invoked to enlarge or confer a power upon him to act. The duty sought to be enforced must be a duty which still exists at the time when the application for the writ is made; and it has frequently been asserted that the duty to act must be clear." 18 R. C. L. 117, sec. 31. See 38 C. J. 582; *State v. Colby,* 107 Neb. 372; *Gutschow v. Ramser,* 87 Neb. 591; *State v. Weston,* 67 Neb. 175; *State v. Whipple,* 60 Neb. 650; *State v. Bartley,* 50 Neb. 874; *State v. Bowman,* 45 Neb. 752; *State v. Merrell,* 43 Neb. 575; *State v. Nelson,* 21 Neb. 572; *State v. City of Omaha,* 14 Neb. 265.

The county clerk's duties and powers with respect to tax lists are enjoined and granted by the statute. It was his duty, under section 77-1806, to complete and deliver to the treasurer on or before November 1, 1931, the list for taxes levied by the county board of equalization. He did this on September 19, 1931. The evidence shows that sometimes, in previous years, that had been done as early as September 1. After the adjournment of the county board of equalization any taxes otherwise levied must be levied by the clerk. If such taxes as those here involved are certified to him before he "shall have completed the tax list" (section 77-1801) authorized by the board, and before the list shall have been "delivered to the county treasurer" (section 77-1806), it is then his duty to levy such other tax and see that it is "extended upon the tax list" (section 77-1801). We are unable to find that he has any power to make a levy for any additionally certified taxes after he has completed and turned over to the treasurer the main tax list. He derives his authority and

power from the legislature. If it has given him none in such an important function as that of the imposition of taxes, it seems certain that he has no power to enlarge the authority given him by the legislature and to exercise authority of his own devising. His duty to act as relator desired, not only was not clear, but it seems to us that it is clear he had no authority to levy any tax after the tax list made upon the levy of the county board was completed and turned over to the treasurer. Thus he was within the rules of law above recited.

We do not desire to be understood as deciding that, if the county clerk had conspired with the city officials, or others, to prevent his levy of the city tax by a wilful disregard of the rights of the electors of the city and of his statutory duty and by unreasonably hastening the completion and delivery of the tax lists to the treasurer, we would hold that mandamus would not lie. That is not the situation here. When such a case shall be presented we reserve the right to consider and determine whether such conduct would prevent the statute from barring a further levy of taxes.

If further reason were needed for concluding that the appellant was justified in his refusal to levy the tax, it may be said that, from the record and evidence, it appears that disorder and confusion would arise out of such a levy. This confusion would result not so much from the clerical changes in the tax records as from the rights and liabilities as to the levies of the taxes in the cases of those who have already paid and obtained receipts in full for the 1931 taxes.

"Where the issue of the writ would disturb official action, or create disorder or confusion, it may be denied; and this is so even where the petitioner has a clear legal right for which mandamus would be an appropriate remedy." 38 C. J. 550. See, also, Merrill on Mandamus, secs. 71, 73; Ferris on Extraordinary Legal Remedies, sec. 202.

"Courts, in the exercise of wise judicial discretion, may, in view of the consequences attendant upon the issuance

of a writ of mandamus, refuse the writ though the petitioner has a clear legal right for which mandamus is an appropriate remedy." *People v. Board of Supervisors,* 185 Ill. 288, 293. This rule was followed later in denying mandamus where its allowance would have required a recomputation of a considerable portion of the county taxes and a readjustment of taxes already paid by some taxpayers. It is to be noted that this readjustment of taxes in the Illinois case would require refunds from the treasurer to the taxpayers, not a collection of additional taxes, as in the case at bar. *People v. Olsen,* 215 Ill. 620. The supreme court of Oklahoma reversed a judgment granting a writ of mandamus because of the delay in getting the tax rolls extended so as to collect an additional tax, even though it was stated that the petitioners had a legal right to the writ. *Board of Excise v. Board of Directors,* 31 Okla. 553. The relator contributed to the particular condition in the instant case by waiting from September 28 to October 24 to bring this action.

For the reasons stated, the judgment of the district court is

REVERSED.

LIBERTY HIGH SCHOOL DISTRICT, APPELLEE, V. E. A. CURRIE: O. R. LOVELACE ET AL., APPELLANTS.

FILED DECEMBER 31, 1931. No. 27919.

1. **Depositories:** DEPOSIT OF SCHOOL FUNDS: DEPOSITORY BOND. It is lawful for a bank to give a depository bond to a school district to secure a deposit of its funds. Sureties on such a bond are bound thereby, notwithstanding there is no statute expressly authorizing the deposit of such funds in a bank.
2. ———: DEPOSITORY BONDS: EXPIRATION. Section 77-2509, Comp. St. 1929, is not applicable to the deposit of school district funds.
3. ———: ———: LIABILITY OF SURETIES: DEMAND. The law does not require the doing of a vain or useless act.

4. ———: ———: ———: ———. Demand for payment by a principal is not a condition precedent to action against the sureties on a depository bond, where the sureties are contesting the validity of the bond.

APPEAL from the district court for Scotts Bluff county: EDWARD F. CARTER, JUDGE. *Affirmed.*

Raymond & Fitzgerald, for appellants.

Mothersead & York, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

GOOD, J.

This is an action on a depository bond. Plaintiff was the obligee and defendants the sureties on the bond. Plaintiff had judgment, and defendants have appealed.

There is no conflict in the evidence. The following facts appear from the record: On the 5th day of July, 1929, the American Bank of Mitchell, Nebraska, executed and delivered to plaintiff a depository bond in the sum of $10,000 to secure repayment of funds of the Liberty High School District that might be deposited in the bank. Funds were deposited in the bank by the district, and on the 4th of January following, the bank being insolvent, its doors were closed, and shortly thereafter a receiver was appointed. The sureties on the bond were officers and stockholders of the American Bank. These sureties sought to have the treasurer of the district prosecute a claim against the bank as preferred and payable out of the depositors' final settlement fund. The treasurer refused, but, instead, this action was instituted.

Questions of law only are involved. It is argued by defendants that the bond is invalid because the public policy of the state prohibits the deposit of school district funds in a bank. We have not been referred to any statute which expressly authorizes the deposit of funds of a school district in a depository bank; nor have we been able to find any express authority therefor.

In *State v. Keim,* 8 Neb. 63, it was held that "an unauthorized or unratified loan or deposit of public money constitutes no cause of action in the name of the state." In that case action was brought by the state for the deposit of public funds with a banking copartnership. Shortly thereafter the legislature, doubtless influenced by that decision, enacted a statute, now appearing as section 77-2601, Comp. St. 1929, and which reads as follows: "In all cases in which public moneys, or other funds belonging to the state or to any county, school district, city or municipality thereof, have been deposited or loaned to any person or persons, corporations, bank, copartnership or other firm or association of persons, it shall be lawful for the officer or officers making such deposit or loan, or his or their successors in office, to maintain an action or actions for the recovery of such moneys deposited or loaned, and all contracts for the security or payment of any such moneys or public funds made shall be held to be good and lawful contracts binding on all parties thereto: Provided, nothing herein contained shall be construed to in any manner affect the liability of any surety or signors of any official bond hereafter given or made in this state."

While the quoted statute does not expressly authorize the deposit of school district funds, it does provide specifically that it shall be lawful for the officers making such deposit to maintain an action for the recovery of moneys deposited, and that all contracts for the security or payment of such moneys shall be held good and lawful contracts, binding on all parties thereto. In *Bliss v. Mason,* 121 Neb. 484, this court held that said section "authorizes a state bank to contract for indemnity of sureties on a depository bond given by such bank to secure deposit of public funds." Certainly, if the bank were authorized by this statute to indemnify sureties on a depository bond, the bank and the sureties would likewise be held liable upon such a bond.

Defendants have cited a number of sections of the statute relating to the duties of school district officers and to

acts for which they may be liable for embezzlement. We find that none of these statutes cited prohibit the giving of such a bond or relieves the parties from liability thereon when they have executed such a bond.

Defendants argue that the bond is not in force because it had expired on the 1st day of January, 1930, and cite section 77-2509, Comp. St. 1929, as supporting their contention. This section, however, applies only to state and county funds and is inapplicable to deposits of school district funds. This court is committed to the rule that section 77-2601, *supra*, makes valid the contract of a depository bank to indemnify the deposit of such public funds as are specified in said section. We therefore conclude that the bond is a valid obligation.

Defendants argue that the action was prematurely brought because no previous demand had been made on the bank for the payment of the deposit. It is evident that a demand would have been unavailing. The bank could only act through its officers. These officers have been superseded in their duties by the department of trade and commerce. The officers could not have complied, had a demand been made upon them or upon the bank. A demand would have been a vain and useless act. The law does not require the performance of such an act. Furthermore, a demand is unnecessary where defendants deny liability on the contract.

We find no error in the record. The judgment is

AFFIRMED.

SCHOOL DISTRICT OF MITCHELL, APPELLEE, V. E. A. CURRIE: WILLIAM LEDINGHAM ET AL., APPELLANTS.

FILED DECEMBER 31, 1931. No. 27920.

Depositories: DEPOSITS: DEPOSITORY BOND: LIABILITY OF SURETIES. Sureties on a depository bond, securing deposits in a bank which later becomes insolvent, are not released by forbearance of the obligee named in the bond to prosecute an appeal from the decision of the receiver classifying the claim for deposit as general instead of preferred.

APPEAL from the district court for Scotts Bluff county: EDWARD F. CARTER, JUDGE. *Affirmed.*

Raymond & Fitzgerald, for appellants.

Mothersead & York, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

GOOD, J.

This is an action on a depository bond; plaintiff is the obligee and defendants sureties thereon. Plaintiff had judgment. Defendants have appealed.

This is a companion case to *Liberty High School District v. Currie, ante* p. 173, decided at the present sitting of the court. The nature of the action and the defendants are the same, but a different school district is plaintiff.

The pertinent facts are similar to those in the above case with this exception: In the instant case, the district presented to the receiver a claim for the deposit, which he classified as a general instead of a preferred claim. The district refused to appeal from the receiver's action; whereupon a taxpayer of the district filed a petition in intervention and sought, unavailingly, in the district court to prosecute the claim on behalf of the school district. That proceeding was appealed to this court, and it was held that the taxpayer was authorized to prosecute the claim in the name of the district. *State v. American Bank of Mitchell,* 121 Neb. 862.

One other question of law is argued in this case, in addition to those presented and decided in *Liberty High School District v. Currie, supra.* Defendants argue that it was the duty of the plaintiff to protect the defendants in this action by prosecuting its claim against the receiver for a preference, and, had it done so, it might have recovered the full amount of its deposit, without resorting to an action on the bond. True, the plaintiff might have prosecuted an appeal from the receiver's decision, but was

not obliged so to do. Mere forbearance to prosecute an appeal will not release the defendants.

In *Eickhoff v. Eikenbary*, 52 Neb. 332, it was held: "Mere forbearance by a creditor to sue a principal will not release the latter's sureties; and this is true although by lapse of time remedies may be lost against the principal." Plaintiff had a right to pursue either or both remedies. It might have more than one judgment, but could have but one satisfaction of its claim. *State v. American Bank of Mitchell, supra.* If defendants had desired to protect themselves by prosecuting a claim for a preference, they might have done so by paying the amount of the deposit and thereby been subrogated to the rights of plaintiff. This they failed to do.

The other propositions of law presented on this appeal are fully disposed of in *Liberty High School District v. Currie, supra.*

We find no error in the record. Judgment

AFFIRMED.

TED WELLS V. STATE OF NEBRASKA.

FILED DECEMBER 31, 1931. No. 28037.

1. **Intoxicating Liquors:** CONVICTION OF POSSESSION: INSUFFICIENCY OF EVIDENCE. In a criminal prosecution under two counts, charging possession and transportation of intoxicating liquor, evidence showing no possession other than was strictly incidental to transportation, *held* insufficient to sustain conviction on charge of possession.
2. **Criminal Law:** PRIMA FACIE CASE. A *prima facie* case is not necessarily conclusive before the jury in a criminal case, since the state may make a *prima facie* case which enables it to go to the jury and yet defendant may be acquitted by the jury for want of evidence of proof beyond a reasonable doubt.
3. ———: INFORMATION: GENERAL VERDICT. Where there is one good count sustained by the proof, a general verdict of guilty will be referred to and sustained by it, although there are other counts in the complaint which are defective or unsupported.

ERROR to the district court for Gage county: FREDERICK W. MESSMORE, JUDGE. *Reversed in part and affirmed in part.*

Loren H. Laughlin, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

Heard before ROSE, GOOD, DAY and PAINE, JJ., and BEGLEY, District Judge.

BEGLEY, District Judge.

Plaintiff in error was prosecuted in the district court for Gage county on a complaint charging him in the first count with unlawful possession of intoxicating liquor and in the second count with unlawful transportation of intoxicating liquor in an automobile. The plaintiff in error was convicted by a jury on both counts and was sentenced to pay a fine of $100 on the first count and to serve 60 days in the county jail on the second count, and the court also ordered the automobile used by plaintiff in error for the transportation of liquors to be confiscated. The plaintiff in error brings error proceedings in this court.

The first proposition of error relied upon by the plaintiff in error is that he was convicted of both possession and transportation charges, where no possession, independent of transportation, is shown by the evidence. The evidence discloses that the deputy sheriff and his assistant secreted themselves and their automobile along the public highway in Gage county, Nebraska, and shortly thereafter the plaintiff in error drove his car past them, turned the corner of the highway and stopped. The officers drove up and commanded him to surrender. He gave flight and was pursued by the officers, who fired at the car. During his flight, plaintiff in error was observed by the officers to throw four gallon tin cans out of his car. These were recovered and produced at the trial and were shown to contain intoxicating liquor. Plaintiff in error in his flight drove into a farm yard and attempted to conceal himself but was captured by the officers.

In *Haarmann v. State,* 111 Neb. 790, it was held that a defendant may be convicted of both unlawful possession and unlawful transportation of intoxicating liquor, where the evidence shows that the defendant remained in possession of liquor after his transportation of it had ceased. We do not think the evidence is sufficient to warrant the assumption that the transportation had ceased in the present case, but that at time of arrest he was in flight in an attempt to transport the same. The fact that the car stopped momentarily does not conclusively prove that the transportation was complete. The possession was only incidental to the transportation. The motion of plaintiff in error, made at the close of the state's case, to dismiss the first count of the complaint should have been sustained.

The next assignment of error is that the court prejudicially erred in instructing the jury in instruction No. 8, as follows:

"The jury are instructed that by the term *'prima facie* evidence' of a fact is meant such as establishes the fact, and, unless rebutted or explained by the evidence, it becomes conclusive and is to be considered as if fully proved.

"You are further instructed that this does not relieve the state of proving beyond a reasonable doubt every element of the offense charged in the complaint. You are, however, instructed that at all times the burden of proof is upon the state to prove beyond a reasonable doubt every essential element of the offenses charged in the complaint."

The first paragraph of this instruction is inaccurate and technically erroneous. *Prima facie* evidence is not conclusive evidence in a criminal prosecution. *"Prima facie* evidence is sufficient to support a verdict in favor of the party by whom it is introduced where no controverting evidence is introduced by the adverse party." 23 C. J. 9. See *Eckman Chemical Co. v. Chicago & N. W. R. Co.,* 107 Neb. 268, and *Smith v. Gardner,* 36 Neb. 741. A *prima facie* case is not necessarily conclusive before the jury in a criminal case, since the state may make a *prima facie* case which enables it to go before the jury, and yet defendant

may be acquitted by the jury for want of evidence of proof beyond a reasonable doubt. *Griffith v. Arnold & Rasmussen,* 204 Ia. 1216.

This instruction is referable only to the question of fact as to the defendant's guilt of the illegal possession of liquor as charged in the first count of the information. The judgment and conviction of the defendant on the first count is reversed and the same is dismissed for the reason that the only possession of the defendant was incidental to transportation. This instruction was not applicable to any question of fact to be determined relative to illegal transportation in the second count, as to which the judgment is affirmed. Therefore, the giving of this erroneous instruction was not prejudicial in this case and does not require a reversal of the judgment.

The next proposition on which plaintiff in error relies for reversal is that the verdict was a general one of guilty as charged in the complaint, instead of a specific finding of guilty on each count. This verdict clearly indicates, beyond a reasonable doubt, that it was the intention of the jury to find plaintiff in error guilty on each count of the information and is sufficient to justify a sentence on each count. Where there is one good count sustained by the proof, a general verdict of guilty will be referred to and sustained by it, although there are other counts in the complaint which are defective or unsupported. 16 C. J. 1106.

The judgment of conviction of plaintiff in error on the first count of the information is reversed and same dismissed; and the judgment of conviction on the second count is sustained.

REVERSED IN PART AND AFFIRMED IN PART.

BRAUN, RAY BROTHERS & FINLEY COMPANY, APPELLANT, V. A. F. ROBERTS CONSTRUCTION COMPANY ET AL., APPELLEES.

FILED DECEMBER 31, 1931. No. 27898.

Appeal: REMITTITUR. Where the only error in a judicial record consists of an excessive recovery, the error may be corrected on appeal by a remittitur, if the amount of the excess is definitely shown.

APPEAL from the district court for Jefferson county: FREDERICK W. MESSMORE, JUDGE. *Affirmed on condition.*

J. E. Ray and *Denney & Denney*, for appellant.

John C. Hartigan and *M. A. Bender, contra.*

Heard before ROSE, GOOD, DAY and PAINE, JJ., and NISLEY, District Judge.

NISLEY, District Judge.

This is an action to recover $846.54, the agreed price of three carloads of lumber sold and delivered by plaintiff to defendant and accepted and used.

In a cross-petition defendant pleaded that he purchased from plaintiff 15 cars of lumber consigned to different places; that the lumber first shipped was not of the grade purchased, part of it being unfit for use, and plaintiff being so notified; that the parties afterward agreed defendant should accept and use the 15 cars, cull what lumber was unfit for use, purchase and substitute other lumber for the culls, and cut defective parts from usable pieces and utilize the latter; that plaintiff agreed to pay for the substituted lumber and for the extra work incidental to the use of defective materials in the original shipments; that defendant paid all lumber bills presented by plaintiff except a balance of about $800. Under the agreement pleaded in the cross-petition defendant's claim for substituted lumber and extra expenses on account of defects was $2,184.81.

The facts on which the cross-petition of defendant was based were put in issue by an answer of plaintiff. Upon a trial of the issues the jury rendered a verdict against

plaintiff on its petition and in favor of defendant for $1,000 on the cross-petition. From a judgment against plaintiff for that sum it appealed.

An assignment of error challenges the verdict in favor of defendant as excessive. The cross-petition and the undisputed evidence show conclusively that defendant incurred liability for the purchase price of the three carloads of lumber for which plaintiff in his petition demanded judgment for $846.54. There was therefore no legal justification for a verdict against plaintiff on his petition. The limit of defendant's legal recovery against plaintiff on the cross-petition was $1,000 and the trial court so instructed the jury in specific terms. There is sufficient competent evidence to support the verdict in favor of defendant for that sum. The record clearly shows, therefore, that the verdict and judgment are excessive to the extent of $846.54. To correct the error defendant will be permitted to file with the clerk of this court within 20 days a remittitur for $846.54 as of the date of the judgment of the district court. Upon the filing thereof, the judment will stand affirmed to the extent of $153.46. Otherwise, it will stand reversed and the cause remanded for a new trial. Other assignments of error seem to be without merit.

AFFIRMED ON CONDITION.

EMMA HOLTMAN, ADMINISTRATRIX, ET AL., APPELLANTS, V. ALBERT LALLMAN ET AL., APPELLEES.

FILED DECEMBER 31, 1931. No. 27[illegible].

1. **Deeds**: VALIDITY. Where an aged parent, whose mental competency is much weakened, who has for many years lived with and trusted the entire management of all his business affairs to a son, conveys all his land to the son, which comprised much the greater part of his property, such transaction should be scrutinized with care, and the presumption is against the validity of the deed, and the burden is upon the son to show that the grantor had sufficient mentality to understand the transaction and that it was not the result of undue influence or imposition.

2. ———: ———. Evidence examined and found to be sufficient to establish the validity of the transfer of the land.
3. ———: RENTS: PAYMENT: PROOF. In this case the parent retained a life estate in such land, and the son used the land under a claim that he rented the same from his father, and the son pleads that he paid the father for such rent by supporting the father. The evidence examined and found insufficient to prove such payment.
4. Gifts: VALIDITY. The defendant Albert Lallman claims that his father, August Lallman, made a gift to him of a large sum of money which comprised practically all of his property, to the exclusion of other children with whom the father was cordial, at a time when the father was 89 years of age, was physically weak, and whose mental capacity to transact business was at least very doubtful, and the father for many years had lived with and had entrusted the son with the full conduct of all his business affairs, apparently indifferent to such transactions, such gift, under the situation disclosed in the evidence, if made, cannot be upheld.
5. Landlord and Tenant: LEASE OF FARM LANDS. Generally in this state, in the absence of any different agreement, a yearly lease of farm lands begins on March 1 and ends on February 28, of the succeeding year, and the rental becomes due at the expiration of the term.
6. ———: ———: TERMINATION OF LEASE: LIABILITY FOR RENT. Where a life tenant dies before the expiration of a yearly lease of farm lands, the owner of the fee, who was the tenant, is not liable for that year's rental, in the absence of proof as to the rental value up to the time of the life tenant's death.

APPEAL from the district court for Washington county: FRANCIS M. DINEEN, JUDGE. *Reversed, with directions.*

Abbott, Dunlap & Corbett and *O'Hanlon & O'Hanlon*, for appellants.

A. C. Debel and *Maher & Carrigan, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and RAPER and RYAN, District Judges.

RAPER, District Judge.

This is a suit to set aside a deed to 240 acres of land in Washington county, made by August Lallman, deceased, to his son Albert and to recover rents and a sum of money

from Albert, on the grounds of mental incompetency of grantor and undue influence exerted by Albert. The trial resulted in a general finding and decree for defendants.

August Lallman died on June 17, 1928, leaving the following heirs: Emma Holtman, a daughter; William Lallman, a son; Mary Lallman, a daughter; Albert Lallman, a son; and Florence and Mabel Langhorst, daughters of Lizzie Langhorst, a deceased daughter. This action was brought by Emma Holtman as an individual and as administratrix of the estate of August Lallman, deceased, and Florence and Mabel Langhorst, as plaintiffs, against William, Mary and Albert Lallman defendants.

The petition alleges that August Lallman died intestate, and the deceased, from and after 1923, by reason of old age, and physical weakness and mental incompetency, was unable to understand or transact business, and that by reason of said incompetency, and undue influence, Albert obtained a deed from his father on April 16, 1924, to 240 acres of land, being all the land he owned; that the deed reserved a life estate in the grantor, and that Albert owed his father rent for the land for the years 1924 to 1928, inclusive, and that on January 19, 1928, Albert wrongfully converted to his own use money of his father in excess of $7,000. William and Mary did not answer. Albert's answer denies the alleged mental incompetency of his father, and denies any undue influence, alleges the deed was a gift, as was the money, which was obtained in January, 1928, and pleads statutes of limitation as to deed and all rent prior to 1926, and alleges that he paid his father for all the rent.

The deceased and his wife lived on the land in controversy for many years, and accumulated considerable property. The deceased daughter and Emma Holtman had married and left the home many years ago. William, Mary and Albert remained at home continuously with the parents. Albert married in 1920 and brought his wife to the home. William and Mary never married. The family relation appears to have been friendly until after the death

of the father. He died June 17, 1928, at the age of 89 years; the wife died in 1927. The petition alleges that William and Mary were mentally incompetent, but the only testimony to substantiate that was a statement by the witness Schoettger that, about 15 years ago, August told him that Albert was the only one there (at the home) capable of taking care of the business. However, William was called as a witness for the defense, and it is in evidence that he had a substantial account in a bank and that he sold some land to Albert. Mary did not testify. Albert began writing checks on his father's bank account in 1916, or 1917, and from that time wrote all the checks and had full management and control of the farm and his father's business affairs, and Albert received all proceeds from the farm since 1917. Under this situation the presumption is against the validity of the deed and the alleged gift of money and rent, and it devolved upon Albert to show that the father had sufficient mental capacity to make such conveyance and that his acts were free and voluntary and free from undue influence. *Gibson v. Hammang*, 63 Neb. 349.

This being a trial *de novo*, the rulings of the trial court in refusing to admit much evidence that should be before us is unfortunate. The parties were unduly limited in the admission of proper testimony, and in cross-examinations, particularly in the cross-examination of Albert, and counsel on each side were not diligent in offering much that might aid. In such cases a full disclosure of the properties, advancements, conduct of the parties and family situation should be permitted.

The testimony as to mental incompetency of the father is quite contradictory, but it is in proof that as early as 1902 the father had begun to fail very appreciably in his memory, so that he at times would not recognize his daughter and his grandchildren, and had attacks of illness, and that particularly after the fall of 1923 he conversed very little, except he would talk more freely of things that had happened in Germany where he was born, and on one or

two occasions he wandered away and became lost, and in 1921 at one time could not remember that Albert was married, and in the spring of 1921 he complained to a son-in-law that his money was all gone, and inquired if the son-in-law knew anything about some bonds and stamps, that he, August, had lost them, and when oats were four inches high, asked the son-in-law when he was going to cut them, and that he was physically getting weaker; that in 1923 the deceased could not remember a debt that was owed to him by Edward Langhorst, the husband of the deceased daughter, and witnesses testified that August was incompetent during 1923, and ever since till death. These are a few of the incidents referred to in the testimony to indicate that his memory and mind were at least very weak. On the other hand, defendants' witnesses testify that the father's mind at all times, except during a period of illness in the fall of 1925, was clear, and he was competent.

On the 16th of April, 1924, Albert went to Arlington, and brought to the home Mr. Schoettger, the president of the bank, where August had for many years transacted business. Albert testifies he got Mr. Schoettger at his father's request. At the home Mr. Schoettger testifies that August told him he had divided all his property with the girls and did not think it was any more than right that he should make deeds to the land he had to the boys, and that he wanted to retain a life estate, or the use and occupancy of the premises for himself and wife during their lives, and the deed to the 240 acres was so drawn and there read, signed and acknowledged by August and his wife and given to Mr. Schoettger, who afterwards gave it to Albert, and it was recorded the next day. It further appears that August told Schoettger that he wanted to deed the 240 acres to Albert and a 120-acre tract to William. The court refused to permit witness Schoettger to answer about the second deed. August at that time owned no real estate other than the 240 acres. Albert and William and the mother were present, but made no effort to correct the father about his not owning 120 acres, a very curious over-

sight. The land at that time was worth $250 an acre. As to what the father said about having divided up all his property with the girls, there is no evidence that Mary ever received any. Mr. Langhorst testified that the father told him in 1923, after Mrs. Langhorst's death in August of that year, speaking of a $2,000 loan, which witness offered to pay at that time, "let it go, and let that go for the girls," and said the girls are going to get some more money; and Mr. Langhorst further testified that, after his wife's death and before he talked to the father about the $2,000 loan, Albert came to him and said: "Father sent him over to tell me that since Lizzie (the deceased daughter) died Florence and Mabel were to have the money that Lizzie was to receive, now since Lizzie was dead." Albert did not deny this. Four witnesses besides Albert testified that August had stated at different times 10 or 15 years before his death that Albert was to have the farm. These statements are weakened materially, for it is shown that Mr. Lallman had a will in existence at the time the deed was made, which devised the farm to Albert, but provided that Albert should pay the girls the difference. This was a statement that Mary made to Mr. Langhorst. The court would not permit Albert to be questioned about the will. After the death of the father, Mr. Langhorst and Emma and Edward Holtman went to the home of Albert and inquired about the father's property. Albert became enraged and swore at them and threatened Holtman with a chair and told them it was none of their damned business, and when asked about the will said it was destroyed, and it was none of their damned business who destroyed it. Albert did not deny this. Albert's deposition was taken in March, 1930. This case was tried in January, 1931. In that deposition Albert testified that in March, 1928, he burned his father's will by his father's order. There is no evidence aside from the above statement as to the contents of the will. The inference may be drawn that it was to Albert's interest to have the will destroyed. Albert never told any of the plaintiffs or their families that he had a deed to the

farm and they testified they did not know of the deed until after the father's death. While there are many suspicious circumstances connected with the making of the deed, Mr. Schoettger testified directly to the father's competency; the mother and brother, William, were there; and we find that under all the circumstances shown the deed should stand. It will be unnecessary to determine the question of the statute of limitations.

After the deed was made Albert made improvements on the place, paid the taxes and insurance, and paid the living expenses of all the family, and claims that the support was pay for the rent, and that no rent was demanded and the acquiescence of the father confirms his right to the rent. Under some circumstances this might be conclusive, but under the situation here it has but little force. Celia, Albert's wife, testified that in the fall of 1921 August told her in Albert's presence that Albert would not have to pay any more rent. Albert does not confirm this. In the March deposition he stated that before the deed was signed his father had not said anything about the use of the land. In 1921 the father stated to the Holtmans that Albert was to pay him rent and he could live on that, as he was then planning to move to the Holtman place. Albert claimed to have rented the place for 1921, and produced a check payable to his father as proof of payment for that year, but the father's bank account did not show such deposit, and Albert admitted he received all the proceeds from the farm since 1917. At the trial Albert testified that his father took an interest in the farm affairs and discussed them until about the time of his death, but in the deposition he testified that his father did not talk over farm affairs or business for five or six years before his death. As before stated, it may be doubted whether the father from 1923 was able to carry on business transactions generally; his great age and weakening powers were having a material effect. He no doubt was a man of acquisitive habits, and it is improbable that he would willingly and knowingly divest himself of all his personal property, and the impli-

cation naturally arises that some influence intervened outside of his own will, even if he was competent, to have him yield all of his property to Albert. As to the expense of keeping the family, Albert testified that he did not pay his father any money, outside of the expense of the family. William lived with them and worked as a farm hand, presumably a healthy man, and Albert paid him $50 a year. Mary worked in the fields and helped with the housework and received no pay except her clothes and board. In addition to the income from the farm, Albert received large sums checked out of his father's bank account. Deposits in August's bank account from 1920 to 1927, inclusive, were about $3,300, and in addition to that Albert received $750 in Liberty bonds and a $500 check from his father in 1919, making about $5,000, exclusive of the sum of $7,849 hereafter referred to. No authority for these are proved except Albert's statement that all the checks he gave were by his father's direction. He offered no proof of the amount of taxes paid. Albert has not sustained the burden of proof as to his payment of the rent, nor his right to withhold it. The plaintiffs do not ask for rental before 1924. He will be charged with $1,920 yearly rent for the years 1924 to 1927, inclusive (the rental value was proved to be $8 an acre), with interest on each year's rent from March 1 of the succeeding year. The father died in June, 1928, and Albert is not chargeable with the rent for 1928, and having failed to prove the amount paid for taxes he is not entitled to a set-off for that.

The other remaining item claimed by plaintiffs is the sum of $7,849, of which amount it is alleged $5,142.12 was drawn by Albert from the bank account of the father in January, 1928. Deceased's bank account shows a deposit on October 21, 1927, of $7,849. Checks for about $1,810 were drawn against it between October 21 and December 13, 1927, leaving a balance of $6,142.12. On January 19, 1928, a check in Albert's favor signed "Aug Lallman by A. L." was charged to the account. Albert testified that his father gave him this sum and reserved the $1,000 bal-

ance in the bank to pay for funeral and church subscription. There is nothing to show from what source the $7,849 deposit came.

Plaintiffs do not ask for the sums checked out in December. Mr. Schoettger wrote out the check for Albert at the bank and Albert signed it and took the proceeds. Mr. Schoettger said that about a month after that he went to see Mr. August Lallman about the check and asked Mr. Lallman if it was all right and Mr. Lallman replied: "Sure it was or I would not have told you to let him (Albert) take care of my account I had there." Mr. Schoettger says that William, Albert's wife, and, he thinks, Albert were there, but none of them testify to this conversation. Albert testified that no one was present when his father told him to take the $5,142, and they had only the one conversation about it, and that was on the day the check was given. Celia, Albert's wife, testified that in December, 1927, she heard the father tell Albert that he should have all the money in the bank but $1,000. Albert never told plaintiffs or their families anything about the moneys he received, or any of his dealings with his father. Albert's testimony at the trial was flatly contradictory to the testimony given in his deposition in many important facts and but little credence can be given to his testimony. Mr. Schoettger may not be entirely disinterested, and even if, at a short visit he made, the deceased appeared then to understand, he would not be in position to know about any influence that may have been previously imposed on this 89-year-old man, and it will be remembered that Albert took care to be present. The situation in regard to this $5,142 is in some respects similar to *Chamberlain v. Frank*, 103 Neb. 442, where it is said that a conveyance made by one well stricken in years, living under such circumstances as to place him under the control and domination of a son, will be closely scrutinized, and when from the evidence, or lack of evidence, the court is satisfied either that the grantor was incompetent to transact business of that nature, or that his mind was so overborne by influences which in its

weakened state it was unable to resist, and that he made the conveyance disregarding the natural affection to his other children, and which he would not have made if uninfluenced, or that a combination of both weak mentality and undue influence existed, it will set aside the conveyance.

In this case there is no direct evidence of undue influence exerted upon the deceased, but under all the evidence we have reached the conclusion that August Lallman was in such condition of mind at the time of the alleged gift of the $5,142.12 as not to have been a free agent. There may be doubt as to whether the father did give it. We find that plaintiffs are entitled to recover that sum from Albert, with interest at 7 per cent. per annum from January 19, 1928. The plaintiffs ask no recovery for the $1,000 balance, as it was used for funeral and other expenses.

The plaintiff Emma Holtman, as administratrix of the estate, is entitled to judgment against Albert Lallman for the rent, to wit: $1,920 with interest at 7 per cent. from March 1, 1925; $1,920 with interest at 7 per cent. from March 1, 1926; $1,920 with interest at 7 per cent. from March 1, 1927; $1,920 with interest at 7 per cent. from March 1, 1928; also the sum of $5,142.12 with interest at 7 per cent. from January 19, 1928. The decree of the district court is reversed and the cause is remanded, with direction to enter judgment as above stated, and to confirm the deed to the 240 acres.

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1932

ELMER P. FOLKEN, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED JANUARY 7, 1932. No. 27976.

1. **Pleading:** AMENDMENT. "Prejudicial error cannot be predicated on an order allowing a pleading to be amended, when the amendment does not change the issues, nor affect the *quantum* of proof as to any material fact." *Cate v. Hutchinson*, 58 Neb. 232.
2. ———: ———. Section 20-852, Comp. St. 1929, permits an amendment of a petition to conform to the proof where such amendment merely increases the amount of the plaintiff's claim for damages in an action to recover for injuries to his truck arising out of a collision with defendant's engine.
3. **Evidence of Value.** In an action for damages on account of injury to personal property, the owner thereof is qualified by reason of that relationship to give his estimate of its value.

APPEAL from the district court for Colfax county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

C. A. McGaw, Thomas W. Bockes, Thomas F. Hamer and *George W. Wertz*, for appellant.

John C. Sprecher, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and REDICK, District Judge.

GOSS, C. J.

Plaintiff recovered a judgment for $1,526.40, for damages to his truck, caused by its collision with defendant's engine.

Plaintiff had alleged and prayed for $879.25. At the conclusion of plaintiff's testimony on rebuttal, he asked leave to amend the petition to conform to the evidence as to the amount of damages. Defendant objected on the grounds that the request came after the proof was in and without opportunity to meet it, and that the defendant was taken by surprise. The objection was overruled. Plaintiff amended his petition so as to allege and pray for $1,750. The ruling is assigned as one of the errors. Defendant had submitted no evidence as to the amount of damages. After the amendment was allowed he did not ask to submit any evidence nor ask for a continuance. He contented himself with an exception to the ruling. That is the last word appearing in the bill of exceptions. Evidence had been received which, if properly admitted, justified a verdict for the amount prayed for in the amended petition. The amendment did not change the issues nor the character of the proof. Section 20-852, Comp. St. 1929, permits an amendment of a petition to conform to the proof where such amendment merely increases the amount of plaintiff's claim for damages in an action to recover for injuries to his truck arising out of a collision with defendant's engine. "Prejudicial error cannot be predicated on an order allowing a pleading to be amended, when the amendment does not change the issues, nor affect the *quantum* of proof as to any material fact." *Cate v. Hutchinson*, 58 Neb. 232. There was no error or abuse of discretion in allowing the petition to be amended.

The collision occurred about 9 o'clock on the night of September 19, 1927. Plaintiff had been engaged for several years in the business of trucking live stock to the Omaha market and bringing groceries back. He had secured a load of hogs and calves northwest of Schuyler. His route led him south across the defendant's railway at Schuyler by way of Colfax street, which is 66 feet wide. The middle 30 feet was graveled. The right of way is 100 feet wide. The railway runs almost east and west. About 20 to 25 feet north of the crossing was a light about 20 feet from

the ground on a pole on the west side of the street. About 50 feet south of the crossing on either side of the street was an electrolier with three lights on each iron post about 10 feet high. North of the tracks and west of the crossing is a coal-shed about 100 feet long and 18 feet high, about a foot from the right of way. South of the tracks is another coal-shed in about the same relative position and of about like dimensions. About 50 or 60 feet west of the crossing and between the north track and the west-bound main track stands the section-house or tool-shed, 12 by 16 feet, the height not shown. Two rows of telegraph poles are located about in a line with the south side of the section-house. Five tracks cross Colfax street. First, on the north, is the switch track, the center of which is 6 feet from the right of way line; it is 44 feet from this center to the center of the west-bound main track, 13 feet more to the center of the east-bound main track, 17 feet farther to the center of the next sidetrack, and 14 feet beyond that to the center of the fifth and last track on the south. It is 6 feet more to the south line of the right of way. The street lights were lit. The defendant maintained a wigwag and gong, located on the crossing about 20 feet north of the west-bound track. It does not operate except for trains on the above described east-bound and west-bound tracks. No watchman is provided for this crossing. Plaintiff had frequently used the crossing for years and knew these facts. It had been misting but had cleared. The night was dark.

Plaintiff was driving, accompanied by Arthur Spence, who had been employed by him for several years as a truck driver, who was also familiar with the crossing. The truck was equipped with headlights and brakes all in good condition. They approached the crossing going 12 to 15 miles an hour. Plaintiff saw that the signal was not operating, entered the crossing, looked east and west and saw no trains, fed his engine some more gas and proceeded across. As they were crossing the north main track, driving about 12 miles an hour, they heard two short whistles close together and saw an engine coming from the west on the

fourth track. Plaintiff applied both his emergency brake and his foot brake, but struck the engine a few feet back of the front near the steam chest. The truck was carried alongside the engine until the engine stopped. The truck had slipped back along the engine so when both came to a stop the truck was on the east sidewalk and the back of the engine was about 15 feet ahead of the truck. The engine was 60 or 70 feet long. There was evidence that the engine was coming on the crossing when it whistled, that it had no headlight, that the street lights from the electrolier on the south of the right of way would not shed light on the tracks very far west of the crossing because of the shadows cast by the coal-sheds adjoining the right of way on the south. The engine had brought a train from the west, had been uncoupled about a block away, and had been brought forward to take water at a point 500 feet east of Colfax street crossing. While the train crew and other witnesses for defendant testify that the headlight, as well as smaller lights on the engine, were burning, yet, on the assignment that there was not sufficient evidence for the jury to find that the headlight was not lighted, we must take the evidence as submitted to the jury. There was sharp conflict on this point.

Under section 74-572, Comp. St. 1929, a headlight of the power and visibility described in the section is required to be used at the time and in the service in which the engine was moving in the instant case. Failure of such equipment is evidence of negligence to be considered by the jury. Whether the plaintiff looked for the engine where by looking he could see or listened where by listening he could hear went rather to the question of his contributory negligence. The question of negligence of the defendant and of contributory negligence of plaintiff was submitted to the jury in an instruction on comparative negligence appropriately phrased. There is no ground for reversing the judgment for insufficiency of the evidence.

Error is assigned because the court, by its first instruction, submitted as one of the charges of negligence the

"permitting various obstructions on its right of way which partly shut off plaintiff's view to the west." Defendant claims this is not alleged in the petition. The petition is not artfully drawn, but no move was made to require it to be made more definite. The other charges of negligence given by the court to the jury were abstracted by the court from the fifth paragraph of the petition; but in the fourth paragraph thereof plaintiff alleged that "there are buildings erected near stated switches and close to said highway on the west of that crossing, which obstruct the view somewhat of drivers upon stated street." There was shown in evidence as obstructions "west of that crossing" only the section-house and the two lines of telegraph poles heretofore mentioned. This allegation of the petition evidently was intended as one of the items of negligence. There was about as much testimony concerning it as was received on some others of the four charges of negligence in the petition. The crux of the case of plaintiff was the question of the headlight. Defendant requested no instructions. Perhaps it would not have been error to have failed to instruct the jury as to these alleged obstructions, for erection and maintenance of convenient structures is not ordinarily negligence as to one who is familiar with the situation. *Rickert v. Union P. R. Co.*, 100 Neb. 304. Yet there was some evidence on the subject, and so we think there was no prejudicial error in the giving of the instruction.

Defendant complains of the ninth instruction, in which the court abstracts section 74-562, Comp. St. 1929, requiring either a bell to be rung or steam whistle to be blown on each locomotive "at least eighty rods from the place where the railroad shall cross any road or street, and be kept ringing or whistling until it shall have crossed such road or street." The jury were instructed they might consider these requirements in determining questions of negligence and contributory negligence. The evidence on behalf of plaintiff justified this instruction.

Plaintiff's truck was an International. He testified he had one of the mechanics from the International Harvester

Company at Omaha come up, go over it and give him an estimate on the cost of repairing it to put it in as good condition as before. On defendant's objection he was not allowed to state the estimate. He then was permitted, without objection, to state that it was worth $2,000 to $2,500 before the collision. Thereupon he was asked its value after the collision. Defendant objected on the ground of no foundation and hearsay. The objection was overruled and he stated the value as $250. Plaintiff's counsel asked him how he knew that. Defendant's counsel objected to his answering the question on the ground it was incompetent, and the objection was sustained. Defendant claims it was error to allow plaintiff to testify to the value of his truck after the collision. In an action for damages on account of injury to personal property, the owner thereof is qualified by reason of that relationship to give his estimate of its value. 22 C. J. 581; *Hespen v. Union P. R. Co.*, 82 Neb. 495; *Hawkins v. Collins*, 89 Neb. 140; *Neal v. Missouri P. R. Co.*, 98 Neb. 460; *Gibbons v. Chicago, B. & Q. R. Co.*, 98 Neb. 696; *Miller v. Drainage District*, 112 Neb. 206. The testimony of the plaintiff had shown that the collision and dragging of the truck broke up its engine and "pretty well damaged" the front end of the truck and "the frame all over (was) bent around out of shape." This made the difference in value rule, which was given to the jury and is not assigned as error, applicable. There is no other evidence as to the injuries to the truck. The testimony of the plaintiff, owner of the truck, as to its value before and after the injury was competent to be submitted to the jury to be weighed for whatever the testimony seemed worth.

The judgment of the district court is

AFFIRMED

CENTRAL IRRIGATION DISTRICT, APPELLANT, V. GERING IRRIGATION DISTRICT ET AL., APPELLEES.

FILED JANUARY 7, 1932. No. 27952.

Easements: DRAINAGE. Landowners, by open, notorious, peaceable, uninterrupted, adverse construction, maintenance and use of a drainage ditch discharging water into an irrigation canal for more than the statutory period of ten years, may acquire from the irrigation district an easement for that purpose.

APPEAL from the district court for Scotts Bluff county: EDWARD F. CARTER, JUDGE. *Affirmed.*

Raymond & Fitzgerald, for appellant.

Morrow & Morrow, contra.

Heard before ROSE, GOOD, DAY and PAINE, JJ., and BEGLEY, District Judge.

ROSE, J.

This is a suit in equity commenced by the Central Irrigation District, plaintiff, for a perpetual injunction preventing the Gering Irrigation District, Frank Schenbeck and Olive H. Schenbeck, defendants, from draining water from a marsh by means of a ditch into plaintiff's irrigation canal, called the "Central canal."

The Schenbecks own a quarter section of land in Scotts Bluff county in Gering Irrigation District between the "Gering canal" and the Central canal. The drainage ditch of which complaint is made varies in width from one to two feet, is about a foot deep, extends northward 950 feet from a marsh on the land of the Schenbecks and empties into the Central canal. The area of the marsh does not exceed 15 acres. The ditch therefrom carries seepage and surface water. The Central canal conveys irrigation waters eastward. At the mouth of the ditch the southern bank of the Central canal is two and a half or three feet high. Further east in a cut the banks reach a height of 13 feet or more. In the cut the bottom of the canal is practically level for a considerable distance. No complaint is made of the water from the drainage ditch during the irrigating

season, but the alleged irreparable damages upon which plaintiff relies for an injunction are said to be caused by ditch water and silt which collect in the cut with weeds and remain there after water for irrigating purposes has been shut off at the intake of the Central canal at the close of the irrigating season. As pleaded by plaintiff, the result is that water and silt from the drainage ditch and weeds which naturally fall or blow into the Central canal in winter freeze in a solid mass in the cut, remain there until the following May, interfere with irrigation and necessitate the cleaning of the Central canal at great expense.

In addition to a plea that water from the drainage ditch does not damage plaintiff in any respect but lessens the expense of cleaning the Central canal, defendants interpose the defense that the Schenbecks, by open, notorious, peaceable, uninterrupted, adverse use of their drainage ditch for more than the statutory period of ten years, acquired an easement permitting them to drain into the Central canal surface waters and seepage from the marsh on their land.

Upon a trial of the cause the district court found the issues in favor of defendants and dismissed the suit. Plaintiff appealed.

Should an injunction be granted? Former owners of the quarter section on which the marsh is situated dug the drainage ditch more than 20 years ago without consulting plaintiff and openly and peaceably maintained and used it without interruption or complaint until they sold the land to the Schenbecks in 1913. The latter thereafter likewise continuously used and maintained the ditch without interruption or complaint until officers of plaintiff asked Frank Schenbeck, defendant, to request the Gering Irrigation District, defendant, to make a cement opening at its expense in the bank of the Central canal at the mouth of the ditch. The request was made and granted in 1925. Later plaintiff closed the ditch at the mouth from time to time, but in each instance the obstruction was promptly removed. These temporary interferences occurred after continuous use of the ditch for more than ten years. Evidence of the

facts outlined is not contradicted. There is nothing to show that the initial drainage of the marsh or the subsequent maintenance and use of the ditch for more than ten years was permissive. A pertinent rule of law applicable to easements was stated in an earlier case as follows:

"Where a landowner has openly, notoriously and continuously used a private way across the land of another for more than the statutory period of ten years, it will be presumed that he did so under a claim of right, and the burden of proving the contrary rests on the owner of the servient estate." *Moll v. Hagerbaumer*, 98 Neb. 555.

This principle is discussed in *Majerus v. Barton*, 92 Neb. 685, where other cases involving the same subject are cited. The following is settled law in Nebraska:

"An easement in real estate may be acquired by open, notorious, peaceable, uninterrupted, adverse possession for the statutory period of ten years." *Omaha & R. V. R. Co. v. Rickards*, 38 Neb. 847. See, also, *Jensen v. Showalter*, 79 Neb. 544; *Agnew v. City of Pawnee City*, 79 Neb. 603; *Dunbar v. O'Brien*, 117 Neb. 245.

If the easement interposed as a defense could lawfully have been acquired by prescription, the evidence shows conclusively that the Schenbecks acquired that right. Notwithstanding the evidence summarized and the rules of law quoted, plaintiff contends, nevertheless, that the Central Irrigation District is a common carrier, made so by statute; that its property is held by it in trust for public purposes; that it was without power to grant the easement pleaded as a defense, and that therefore a private or individual right to use the Central canal for drainage could not be acquired by adverse user. In support of these propositions plaintiff cites sections 46-111 and 46-627, Comp. St. 1929, and also *Edholm v. Missouri P. R. Corporation*, 114 Neb. 845. The position thus taken does not seem to be tenable. The power of an irrigation district is not limited to irrigation alone, but extends to drainage, even beyond district boundaries. Comp St. 1929, sec. 46-132. A preponderance of the evidence shows that there is seepage from the Central

canal into the marsh on the land of the Schenbecks—land in a different irrigation district; that water would eventually flow over the bank into the Central canal if the ditch were closed, thus overflowing the flat bottom of the cut longer than water from the ditch. The better view is that plaintiff had power to grant the easement in the first instance.

Edholm v. Missouri P. R. Corporation, 114 Neb. 845, is distinguishable from the case at bar. It is there properly held that title to part of a railroad right of way cannot be divested by adverse possession. Under constitutional and statutory provisions the right to use railroads for the transportation of persons and property is extended alike to the entire public. The right to use water from the canal of an irrigation district is limited to persons owning land therein, the area subject to irrigation by plaintiff being approximately 2,100 acres. Plaintiff has no greater protection from the general law of adverse possession or user than municipalities had before the act of 1899 removed the limitation of time for commencing actions to recover title to or possession of streets and other public grounds. Comp. St. 1929, sec. 20-202. The provisions of that act do not extend to irrigation districts, which are not municipal corporations. *Bliss v. Pathfinder Irrigation District,* p. 203, *post.* Before it was passed, title to or easements in streets were frequently acquired by adverse possession. *Meyer v. City of Lincoln,* 33 Neb. 566; *Lewis v. Baker,* 39 Neb. 636; *Agnew v. City of Pawnee City,* 79 Neb. 603.

The conclusion is that the Schenbecks acquired by prescription an easement to drain water from their marsh into the Central canal. On that ground alone the suit was properly dismissed.

AFFIRMED.

CLARENCE G. BLISS, RECEIVER, APPELLEE, V. PATHFINDER IRRIGATION DISTRICT, APPELLANT.

FILED JANUARY 7, 1932. No. 28019.

1. **Pleading**: DENIAL. "A denial of the very words of the allegations of the petition, without denying their substance and effect, tenders no issue." *Knight v. Denman*, 64 Neb. 814.
2. ———: ———. An answer denying that a bank "is a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska" is insufficient to put in issue the corporate capacity of the bank.
3. **Waters**: IRRIGATION DISTRICTS. An irrigation district, organized under the laws of Nebraska, is a public corporation, but is not a municipality, within the meaning of that term as used in section 77-2601, Comp. St. 1929.
4. **Banks and Banking**: DEPOSITS: PLEDGE OF ASSETS. A Nebraska state bank is without authority to pledge any of its assets to secure a deposit of funds, except in those instances where it is expressly authorized so to do.

APPEAL from the district court for Scotts Bluff county: EDWARD F. CARTER, JUDGE. *Affirmed.*

Morrow & Morrow, for appellant.

Mothersead & York, contra.

Heard before ROSE, GOOD, DAY and PAINE, JJ., and LESLIE, District Judge.

GOOD, J.

This is an action to cancel a real estate mortgage and to quiet in plaintiff title to the mortgaged premises. The trial court entered a decree for plaintiff. Defendant has appealed.

The state bank, of which plaintiff is now receiver, executed and delivered to defendant a mortgage for $5,000 on real estate, an asset of the bank, to secure repayment of deposits of funds that defendant thereafter might make in the bank. Later the bank became insolvent and a receiver was appointed, at which time defendant had $4,714.23 deposited in the bank. The receiver seeks to have the mortgage canceled on the ground that the bank

had no authority to pledge any of its assets to secure such a deposit, and that the contract securing it was against public policy.

In its answer defendant set out in detail the transaction, and claimed that the mortgage was a valid lien to secure its deposit. The answer also contained the following: "Defendant denies that the Irrigators Bank of Scottsbluff, Nebraska, is a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska." A general demurrer to the answer was sustained. Defendant elected to stand upon its answer and refused to further plead.

Defendant argues that the quoted denial puts in issue the corporate capacity of the bank. The denial is of the exact language of an allegation in the petition. The argument is unsound. There is pleaded only a legal conclusion. The denial is in the nature of a negative pregnant. It might be that the bank had failed in some immaterial respect to fully comply with the law in its organization as a corporation, but which failure would be insufficient to deprive it of the right to transact business as a banking corporation. No fact is pleaded which shows in what respect, if any, the bank failed to comply with the statutory requirements in its organization. In fact, defendant dealt with the bank and accepted from it a mortgage executed by it as a corporation. In *Knight v. Denman*, 64 Neb. 814, it is held: "A denial of the very words of the allegations of the petition, without denying their substance and effect, tenders no issue."

The principal question for determination is the power of a state bank to pledge any of its assets to secure the deposit of funds by an irrigation district. The statutes of this state authorize state banks to pledge assets to secure the deposit of certain public funds where the bank has been designated as a depository. Section 77-2506 and section 77-2601, Comp. St. 1929, as construed by this court in *Bliss v. Mason*, 121 Neb. 484, authorize a state bank, designated as a county depository, to pledge sufficient of its assets

to protect the deposit of county funds in the depository bank. It is contended by defendant that the opinion in that case is authority for the securing of a deposit of any public funds by pledge of assets. It is true the language contained in that opinion uses the term "public funds." It is a universal rule that the language in a judicial opinion has reference to and must be construed to apply only to the facts presented by the case under consideration. Whether a state bank could pledge any of its assets to secure a deposit of public funds other than county was not intended to be, and was not, in fact, determined in that case.

Defendant contends that section 77-2601, Comp. St. 1929, authorizes a state bank to pledge sufficient of its assets to secure the deposit of funds made by an irrigation district. That section provides, in part, as follows: "In all cases in which public moneys, or other funds belonging to the state or to any county, school district, city or municipality thereof, have been deposited or loaned to any person or persons, corporations, bank, * * * it shall be lawful for the officer or officers making such deposit or loan, or his or their successors in office, to maintain an action or actions for the recovery of such moneys deposited or loaned, and all contracts for the security or payment of any such moneys or public funds made shall be held to be good and lawful contracts binding on all parties thereto." It is contended that an irrigation district is a municipality, within the meaning of the quoted section.

Corporations are generally classed as public and private. While a municipality is a public corporation, it does not follow that every public corporation is a municipality. In 1 Dillon, Municipal Corporations (5th ed.) 58, sec. 31, the term "municipal corporation" is defined as follows: "A *municipal corporation*, in its strict and proper sense, is the body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purposes of local government thereof. Municipal corporations as they exist in this country are bodies politic and corporate of the

general character above described, established by law partly as an agency of the state to assist in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated." A like definition is found in 43 C. J. 65, and in the same volume, at page 72, we find the following with respect to public corporations: "Public corporations are all those created specially for public purposes as instruments or agencies to increase the efficiency of government, supply public wants, and promote the public welfare. Public corporations are classified as municipal, quasi-municipal, and public-quasi corporations. Public corporations include not only municipal corporations, but also all other incorporated agencies of government of whatever size and form or degree of organization. While all municipal corporations are public corporations, all public corporations are not municipal corporations."

In 43 C. J. 73, it is said: "There is a want of harmony in the decisions relating to what local subdivisions are embraced by the phrase 'municipal corporations.' There are many public bodies which are not corporations in the full sense but resemble them in that they have some of the attributes of a corporation, and which are therefore called quasi corporations. Some of these are almost perfect in their organization and scarcely distinguishable from municipal corporations. Others represent the lowest order of corporate life, with few powers and imperfect organization. Between these two extremes are a large number of districts erected as agencies of government, of divers names and objects, with varying degrees of organization; sometimes styled political, sometimes public, sometimes civil; including counties, towns, townships, school districts, drainage districts, highway districts, improvement districts, hospital districts, irrigation districts, * * * and all other sections of territory delimited and organized for the performance of certain governmental functions; * * * such bodies are not 'municipal corporations' or 'municipalities' in the proper sense."

In *Board of Directors of Alfalfa Irrigation District v. Collins,* 46 Neb. 411, it is held: "Irrigation districts organized under our laws are public, rather than municipal corporations, and their officers are public agents of the state." This holding was approved and followed in *Lincoln & Dawson County Irrigation District v. McNeal,* 60 Neb. 613. There have been many sessions of the legislature since these decisions were handed down. Had the legislature desired, it could have amended section 77-2601, *supra,* to include irrigation districts.

In *State v. Gering Irrigation District,* 109 Neb. 642, it is held that an irrigation district is a public corporation. This holding was followed and approved in *State v. Gering Irrigation District,* 114 Neb. 329. And in *Central Irrigation District v. Gering Irrigation District, ante,* p. 199, it is, in effect, held that an irrigation district is not a municipality. In *Thaanum v. Bynum Irrigation District,* 72 Mont. 221, it is held that an irrigation district is not a municipality. A like holding is made in *Davy v. McNeill,* 31 N. M. 7.

We are constrained to hold that an irrigation district, while a public corporation, is not a municipality or a municipal corporation.

The public policy of this state, with reference to securing of deposits made in state banks, is evidenced by many acts of the legislature. It has authorized banks, designated as depositories, to pledge assets of the bank to secure state and county funds when deposited in designated depository banks. Comp. St. 1929, secs. 77-2503, 77-2508. It has further authorized the securing of deposits by cities, school districts and other municipalities, but has not specifically authorized the pledging of assets for that purpose.

By the enactment of section 8-1,102, Comp. St. 1929, the legislature has further provided: "The claims of depositors, for deposits, not otherwise secured, and claims of holders of exchange, shall have priority over all other claims, except federal, state, county and municipal taxes, and subject to such taxes, shall at the time of the closing

of a bank be a first lien on all the assets of the banking corporation from which they were due and thus under receivership." There can be little doubt that the legislature intended this statutory provision to prevent state banks from securing deposits, by the pledging of assets, except in the specified cases. Had it not so intended, there would have been no occasion to expressly authorize the pledging of assets in certain instances.

But we find a still further enactment by the legislature in section 8-140, Comp. St. 1929, which makes it a felony for any officer or employee of a state bank to directly or indirectly give any consideration of value or render any service for or at the request of a depositor as an inducement, in addition to the legal interest, for making or retaining a deposit in the bank, or for any depositor to accept any such inducement. A pledge of its assets by a bank to secure or retain a deposit is inducement to the depositor to make such deposit, and, in such a transaction, both the bank official, acting for the bank, and the depositor would be subject to criminal prosecution.

From a consideration of all the legislative acts referred to and others, it is clear that the legislature intended to deny, and has denied, to state banks the right to pledge their assets to secure deposits, except in those instances where expressly authorized so to do. The following decisions from other courts support this view: *Farmers & Merchants State Bank v. Consolidated School District No. 3*, 174 Minn. 286; *Divide County v. Baird*, 55 N. Dak. 45; *Commercial Bank & Trust Co. v. Citizens Trust & Guaranty Co.*, 153 Ky. 566, 45 L. R. A. (n.s.) 950; *Porter v. Canyon County Farmers Mutual Fire Ins. Co.*, 45 Idaho, 522.

It is also, by inference, suggested that there is no distinction between a loan and a deposit, and, since banks are authorized to pledge assets for the securing of loans, the same rule should apply to the securing of deposits. A pertinent and convincing answer to this argument is found in *Farmers & Merchants State Bank v. Consolidated School District No. 3, supra.* Commenting upon the dissimilarity

between bank deposits and borrowings, it is said in the opinion (p. 291): "Bank deposits and bank borrowings are alike in but the one respect that one result of each is the relation of debtor and creditor. In every other respect the two operations are not only different but in complete antithesis. Deposits are attracted by the strength of a bank, whereas its borrowings are compelled by weakness or other adverse circumstance. (The borrowing of money has been said to be 'so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money.' *Western Nat. Bank v. Armstrong,* 152 U. S. 346, 351.) Large deposits signify health, and large borrowings banking disease. Springing from opposite causes, the two by their existence signify opposite conditions—deposits the normal, and borrowings the abnormal. Moreover the antithesis holds to the end, for the withdrawal of a deposit is a loss, whereas the payment of a loan is a gain. Deposits continued and increased evidence success, whereas borrowings continued and increased portend failure. Save in the relation of debtor and creditor common to both, the two are different in their every incident—not only different but opposed in origin, in purpose, and in effect. How it comes then that the obvious truth that a bank may pledge collateral for borrowed money can be used to sustain the same power in the case of deposits we cannot understand. The former is clearly necessary, usual and incidental, whereas the latter is neither necessary, usual or incidental, but is positively dangerous. * * * It is not an express power and clearly not included among those implied."

Defendant has cited and relied upon the decisions of other jurisdictions upholding the proposition that a bank may pledge assets to secure deposits. We have examined with considerable care each one of the cases cited. In most instances the opinions are based upon charter or statutory provisions which confer, as construed by the court, the right of a bank to pledge its assets to secure deposits. In

nearly every case cited by the defendant on the proposition, the question has arisen with reference to the securing of public funds of some nature by the pledging of assets, and where the policy of the state has been to protect such funds. But, under our statutory provisions and the policy declared by the legislature of this state, we are compelled to hold that a state bank is without power to pledge any of its assets to secure the deposit of funds except in the instances where expressly authorized so to do.

The district court rightly held that the mortgage should be canceled and the title to the real estate quieted in the plaintiff. The judgment is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. BANK OF CRAB ORCHARD: L. E. LAFLIN, APPELLANT: RUSH G. MYERS, APPELLEE.

FILED JANUARY 7, 1932. No. 27897.

1. **Execution:** INSOLVENT DEBTOR. Where the debtor is insolvent, the issuance of execution and a return *nulla bona* are not necessary, since their purpose is to establish the insolvency of the debtor, and where that is shown by other satisfactory evidence, and the issuance of the execution would be of no practical utility, it may be dispensed with.
2. **Exemption Laws:** CONSTRUCTION. The exemption law of Nebraska, section 20-1553, Comp. St. 1929, providing that the head of a family who has no homestead shall have exempt from forced sale the sum of $500 in personal property, is to be liberally construed by the courts, and in case of doubt should be resolved in favor of the head of the family claiming the exemption.
3. **Exemptions.** Exempt property of a debtor, who is the head of a family, may not be taken from him by appropriating funds, held by a receiver of a bank, which belong to the debtor, in satisfaction of a judgment, any more than such funds could be taken directly on execution, or garnishment.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Affirmed.*

Loren H. Laughlin, for appellant.

F. C. Radke and *Magdelene Craft Radke, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and BLACKLEDGE, District Judge.

PAINE, J.

This is an appeal from a judgment of the district court for Johnson county, Nebraska, denying an application of L. E. Laflin, claimant and assignee of a judgment for $3,426.36 against Rush G. Myers, appellee, purchased from the receiver of the Bank of Crab Orchard. The said Rush G. Myers, as administrator of the estate of Isaac S. Platt, had a deposit in said failed bank, which had been reduced by dividend to the sum of $2,944.52, and the said Rush G. Myers had paid the heirs in said estate and become the owner of said deposit in his own right. Upon this deposit a dividend of $324.68 had been declared, and was due him because he was entitled thereto as assignee. L. E. Laflin, claimant and appellant, made application to have the court order the receiver to pay this and also future depositor's dividends to him to apply upon his judgment entered on a mandate from this court in *Bank of Crab Orchard v. Myers,* 120 Neb. 84. Myers claimed the entire dividend, being less than $500, as exempt to him in lieu of homestead as the head of a family, and his claim was sustained by the district court.

Many of the facts upon which this case is founded were set out in the decision of Good, J., and the dissenting opinion of Rose, J., in the case of *Bank of Crab Orchard v. Myers, supra,* and such facts will not be reviewed in this opinion. The appellee had filed an affidavit, claiming a homestead right in his old farm, which was being foreclosed. On September 22, 1930, the district court determined that Myers had no homestead right in said farm and appointed a receiver therefor. Upon the same date, L. E. Laflin filed an application to apply this dividend of 13 per cent., then declared upon the claim owned by said Myers as assignee, to the payment of the judgment which he had purchased from the receiver against said Myers, originally

founded upon promissory notes given by Myers to the bank. To this application Myers filed affidavits, in which he set out that he was the head of a family, and that his entire property consisted of said dividend of $324.68, two suits of clothes, and three shares of worthless stock, and that he had no other property. This claim for exemption was contested, and it was charged that he was a part owner of the Model Grocery, at 3104 Holdrege street, Lincoln, Nebraska. Several affidavits were filed, and depositions were taken in relation thereto. The son testified that the trade name, Myers & Son, in which name the store was run, referred to his mother and himself, and not to his father; that his mother had advanced $1,000 towards the purchase of the store, and he had advanced $900, and that his father worked simply as a clerk in said store, and had no other interest in it. A personal property tax schedule was signed, "R. G. Myers by wife," and the wife testified that she signed the same in that manner simply under the direction of the deputy assessor.

Rush G. Myers testified that he was 61 years old, lived in Lincoln, that he had no longer any interest in the farm in Johnson county, taken from him under foreclosure, nor other real estate of any kind, no money in any bank or otherwise, and claims said dividend in lieu of his homestead exemptions of $500.

1. The appellant sets up several assignments of error, among them the following: That the court erred in finding appellee entitled to claim exemption up to $500 in the dividend declared by the receiver of said bank; that the court erred in holding that the claim for exemption was properly made and presented by the appellee, and insists that a full and complete disclosure and inventory was not made by the appellee; and that the court erred in not holding that appellant was entitled, as assignee of the bank's judgment, to impound and hold the dividend declared in favor of the appellee, and that this right was superior to any claim of homestead exemption. Appellee had resisted the application upon the ground that no execution had first been

issued. The district court decided that the procedure followed in the case was proper; that the appellant, L. E. Laflin, was not obliged to first issue an execution.

The weight of authority is to the effect that, when it appears that the debtor is insolvent, the issuance of execution and a return of *nulla bona* are not necessary, since their purpose is to establish insolvency of the debtor and want of remedy at law, and where the debtor is shown to be insolvent by other satisfactory evidence, and the issuance of execution would be of no practical utility, it may be dispensed with. *Selz v. Hocknell,* 63 Neb. 503; *Sayre v. Thompson,* 18 Neb. 33; 15 C. J. 1396-1397; *Veith v. Ress,* 60 Neb. 52; *Sturtevant Co. v. Bohn Sash & Door Co.,* 59 Neb. 82.

2, 3. The real contest in this case is based upon two sections of our statutes. Appellee defends upon section 20-1553, Comp. St. 1929, which reads in part: "All heads of families who have neither lands, town lots or houses subject to exemptions as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property, except wages," etc. And appellant rests his case upon section 20-818, Comp. St. 1929, reading as follows: "When cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, but the two demands must be deemed compensated, so far as they equal each other."

Does the statute last set out supersede the statute of exemption in lieu of homestead?

May the appellant, Laflin, have an order of court directing the receiver to pay him this dividend of $324.68, due Rush G. Myers, to apply upon his judgment secured by the receiver upon promissory notes of the said Rush G. Myers, given to the same bank?

Appellant insists that the decision in this case should be governed by the case of *Serhant v. Haker,* 73 Ohio St. 250,

which holds that the right of set-off is not subject to be defeated by the provisions of other sections relating to exemptions. Yet, an examination shows that the Ohio statute on exemptions, section 5441, Rev. St. 1905, is merely permissive, and reads that the husband and wife living together "*may*" in lieu thereof hold exempt from levy and sale real or personal property not exceeding $500 in value, while our Nebraska statute reads on that point that all heads of families "*shall have exempt.*"

We have carefully considered the opinions cited by the appellant, especially this case of *Serhant v. Haker, supra,* and also *Caldwell v. Ryan,* 210 Mo. 17, 16 L. R. A. n.s. 494, 124 Am. St. Rep. 717. We will admit that North Carolina also stands with Missouri and Ohio in *Lynn v. Cotton Mills,* 130 N. Car. 621, but we are convinced that the courts of these three states are entirely out of line with the great weight of authority.

Statutory exemption laws are founded upon public policy. Each state has a right, as well as a duty, to protect an unfortunate head of a family from having all his property taken from him and he be forced to become a charge upon the taxpayers. In perhaps just one state, Louisiana, it was held, in 1850, that exemption laws should be strictly construed, *Hanna v. Bry,* 5 La. Ann. 651, 52 Am. Dec. 606, in which case a horse, used to visit his patients, was taken from a practicing physician. On the other hand, nearly every other court has said that exemption laws should receive liberal construction in favor of the poor man. Without extending this opinion too far, we cite: "Exempt property of a debtor may not be subjected indirectly by appropriating it in satisfaction of a set-off, any more than it might be done upon a judgment obtained on the set-off in an independent action." *Beattyville Co. v. Sizemore,* 261 S. W. 620 (203 Ky. 7). See 25 C. J. 128. A creditor holding a judgment against the debtor, cannot set it off as against a judgment obtained by the debtor, where the debtor's entire property including the judgment does not exceed the amount of his exemption. *Carpenter v. Cool,*

115 Ind. 134. Nebraska has held that a judgment may be claimed as exempt property. *Mace v. Heath,* 34 Neb. 54.

In *Deering & Co. v. Ruffner,* 32 Neb. 845, an insolvent Cass county man was indebted to Deering & Company for $292.35. The company urged him to enter their employ during the rush season, at a salary of $100 a month and expenses, and agreed to pay him one-half the salary in cash and credit the balance on his debt to them. At the end of two months he was given a receipt for $200, and was told with an oath he could get no more. The district court found that he was the head of a family, and was entitled to receive the amount agreed to be paid him. This case may not be exactly in point, as it was decided under a provision of statute exempting 60 days' pay to the head of a family. If we admit that this case is not in point, then perhaps no Nebraska case is exactly parallel, as counsel insist.

The appellant contends that his application comes strictly within his statutory rights, yet "where a plaintiff brings an action for wages due from the defendant, and such wages are exempt to the plaintiff, the defendant cannot counterclaim a debt due from the plaintiff to him, although the counterclaim comes within the letter of the statute." *Bradley v. Earle,* 22 N. Dak. 139, Ann. Cas. 1914A, 1181.

Admitting that this exact question may never have been passed upon by this court, it occurs to us that the exemption law, allowing $500 to heads of families in Nebraska, means exactly what it says, and that courts are required to carry out the exemption law in a liberal spirit, and that the head of every family has the right to have at least $500 personal property that creditors cannot take from him. This court now holds that, when there is a doubt as to whether or not property should be exempt, such doubt should be resolved in favor of the head of the family claiming exemption. The plain purpose of our exemption laws is to save to a debtor, who is the head of a family, personal property up to the value of $500. *Phelan v. Lacey,* 51 Okla. 393,

L. R. A. 1916B, 786. See, also, *Hoyt v. Pullman*, 51 Okla. 717, L. R. A. 1916B, 1288.

The district court was right in holding that the claim of appellee, that $324.68 be safeguarded to him under the exemption laws as the head of a family owning no real estate, is paramount to the claim of the appellant to be given said sum to apply on his judgment against the appellee.

AFFIRMED.

LIZZIE LARSON, APPELLANT, V. L. I. KEITH, APPELLEE.

FILED JANUARY 7, 1932. No. 28001.

1. **Compromise and Settlement.** Where a tenant is holding possession of premises from a landlord under a written lease, and a difference arises between them as to the payment of rent, and the parties enter into a subsequent written contract whereby they agree that if defaulted rent is not paid within a certain time the lease shall be terminated and the tenant will yield possession, and appraisers will be appointed to appraise the value of tenant's interest in a crop of growing grain thereon, and such appraisers are appointed and make such appraisement, after which the claim of the landlord is deducted from the value of the grain, and the landlord delivers to the tenant a check for the amount of the difference, and the tenant, before cashing the check, expressed himself as being dissatisfied with the transaction, yet afterward cashed the check and received full credit therefor; *held*, that the tenant waived any right to question the transaction further, and cannot lawfully withhold possession of the premises from the landlord.
2. ———. Where there is a *bona fide* dispute between parties, and a certain sum is tendered to the creditor, conditioned upon his acceptance thereof in full satisfaction of his claim, the creditor must either refuse the same, or, if he accepts it, he accepts the condition also, notwithstanding any protest. *Partridge Lumber Co. v. Phelps-Burruss Lumber & Coal Co.*, 91 Neb. 396.

APPEAL from the district court for Frontier county: CHARLES E. ELDRED, JUDGE. *Reversed.*

Butler & James, for appellant.

K. F. Williams and *F. J. Schroeder, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

CHASE, District Judge.

This is an action in forcible detention. The plaintiff is the owner of a farm in Frontier county and the defendant is in possession thereof under a lease. At the conclusion of the trial in the lower court, both parties made motions for a directed verdict and for judgment, whereupon the trial court took the case from the jury and rendered judgment in favor of the defendant and dismissed plaintiff's cause of action. From this finding the plaintiff has brought the case to this court for review.

It appears from the record that the plaintiff at the time of the commencement of the action was the owner of a half section of land in Frontier county, Nebraska; that the defendant during the crop year of 1929 had occupied the premises as tenant of the plaintiff. Hereafter, for convenience, the parties will be designated as landlord and tenant. That on the 30th day of September, 1929, the landlord entered into another lease with the tenant for the crop year of 1930; that the tenant was in arrears of rent for the crop year of 1929; that on or about the 18th day of February, 1930, the parties met at the office of the clerk of the district court in Stockville for the purpose of making some sort of settlement of their differences. Upon that date they entered into a written contract wherein it was recited that the tenant was indebted to the landlord for money advanced in the amount of $163.42, and pasture rent of $55, being a total of $218.42, and upon this amount of indebtedness the tenant was entitled to a credit of $39 for fence posts which he claimed he had paid for for the landlord. Whereupon the parties agreed in substance that, in event the tenant did not pay to the landlord the above mentioned items, the tenant would forfeit the lease and deliver up peaceable possession of the premises to the landlord, upon condition that each party should appoint one appraiser and the two choose a third to appraise the number of acres of wheat already planted on the premises

and to be harvested during the year 1930, and fix what they considered a reasonable value for such wheat, which amount should be paid by the landlord to the tenant, less the items of indebtedness due from the tenant to the landlord, and upon payment thereof the lease should be terminated, and the tenant expressly agreed to deliver up possession of the above described premises to the landlord. It further appears that the tenant failed to make the payment due the landlord, and that each party, under their agreement, selected an appraiser, and the two selected a third, and the appraisers went upon the premises and appraised the wheat and found that there were 65 acres planted to wheat and that the reasonable value thereof at the time was $5 an acre. After the appraisement was made, to wit, on the 19th of March, 1930, the parties met again, at which time the indebtedness due from the tenant to the landlord was again discussed and computed to be the sum of $218.42, and the price of the growing wheat at the valuation fixed by the appraisers was computed at $325. A computation was made and it was found the balance due under this arrangement to the tenant, after deducting his indebtedness, was $107.75, whereupon the tenant executed a bill of sale to all his interest in the wheat and the landlord executed and delivered a check to the tenant in this amount, which check was indorsed by the tenant, and credit received thereon the 26th day of March, 1930.

The testimony of the tenant is that, after the check had been delivered to him, he discovered that he had only received pay for two-thirds of the wheat, and that he should have received pay for all, and that he was dissatisfied with the transaction. By his own testimony he states that he made no effort to deliver back the check after he had expressed himself as being dissatisfied, but retained the same and cashed it and has never returned any of the funds to the landlord since that time. There seems to be very little dispute in the testimony of the parties. The appraisers made no effort to fix the value of the tenant's interest in the wheat, but merely found it to be of the value of $5 an acre.

The main objection urged by the appellant is that the findings and judgment of the trial court are contrary to law and not supported by the evidence, and that the trial court erred in overruling appellant's motion for a new trial. The evidence is undisputed that these parties sustained the relation of landlord and tenant, and were having differences concerning the arrears of rent for the year 1929. In order to settle any differences they might have, they entered into a written contract whereby it was agreed by both parties that the tenant should pay the balance of the rent due by the next day after the contract was entered into or appraisers would be appointed to appraise the interest of the tenant in the growing crops on the land. It is evident that the tenant did not pay this rent, because he selected his own appraiser to appraise the property and the landlord selected one, the two selected a third, and these appraisers made the appraisement and returned their findings as to the value of the wheat. The landlord and the tenant, in the settlement of the disputed question, computed the difference between them and found that there was due the tenant $107.75, whereupon it was paid by the landlord and accepted by the tenant and is still retained by him. It also appears that the tenant never paid for the fence posts that he put on the premises for the landlord.

It seems to us that the law governing transactions of this character is so well settled it hardly admits of an argument.

"Where there is a *bona fide* dispute between parties as to the amount due upon an account, and the debtor tenders a less amount than the claim in full settlement, which the creditor accepts, * * * the dispute will be a sufficient consideration to uphold the settlement." *Partridge Lumber Co. v. Phelps-Burruss Lumber & Coal Co.*, 91 Neb. 396.

"Where a certain sum of money is tendered by a debtor to a creditor on the condition that he accept it in full satisfaction of his demands, the sum due being in dispute, the creditor must either refuse the tender or accept it. * * * If he accepts it, he accepts the condition also, notwithstand-

ing any protest." *Partridge Lumber Co. v. Phelps-Burruss Lumber & Coal Co., supra.*

One accepting a check knowing it is offered in full settlement of an account is estopped to claim that deductions in the account were improperly made. *Thomas v. Columbia Phonograph Co.*, 144 Wis. 470; *Nassoiy v. Tomlinson*, 148 N. Y. 326.

The tenant raised no objection to the settlement at the time of the delivery of the check, and even had he done so, and the check was tendered to him, as it was, in full satisfaction of the sum in dispute, the duty was then cast upon the tenant to refuse the same, and if he did not do so he will be held in law as having accepted settlement, notwithstanding any protest he might make.

"A compromise * * * whereby a less sum than that claimed has been paid and accepted in full of plaintiff's claim, bars the right of plaintiff to insist upon a recovery of the amount originally claimed." *Slade v. Swedeburg Elevator Co.*, 39 Neb. 600.

"Where there is a *bona fide* dispute between parties as to the amount due upon an account, and the debtor tenders a less amount than the claim in full settlement, which the creditor accepts, with knowledge that it was tendered as a full settlement, the dispute will be a sufficient consideration to uphold the settlement, and will bar a recovery upon the remainder of the claim." *Chicago, R. I. & P. R. Co. v. Buckstaff*, 65 Neb. 334.

The landlord herein paid to the tenant the amount of the appraisers' award, which was accepted by him, and after acceptance thereof the tenant refused to comply with his agreement to deliver up possession of the premises, claiming that he only received the value of two-thirds of the wheat, when he should have received the value of all of it. Even if this were true, his position would be untenable. If a mistake were made in the amount due him for the wheat by the appraisers or any other party concerned, still he could not be heard to claim a right to the possession of the premises simply because there was more due him

than he received under the settlement. His contract was that he would deliver the possession of the premises if he failed to pay the 1929 rent on the 19th of February. This he failed to do. The computation of the value of his wheat by the appraisers involves a question wholly separated from the right to withhold possession of the premises. If he were correct in his contention, he could have brought an action at law to recover from the landlord the amount yet due him under this settlement, but the fact that he claims an amount due him under the settlement would not justify his withholding possession of the premises of the landlord, and the law seems too well settled that the amount has been fully paid and satisfied by the giving of the check which he cashed and received credit for in full satisfaction of his claim, and he having accepted payment thereof after he claimed that an error had been made in the settlement.

Under the facts, which are almost entirely undisputed, we hold that the trial court erred in rendering judgment for appellee instead of appellant.

For reasons heretofore stated, the judgment is reversed and the cause is remanded.

REVERSED.

LIZZIE LARSON, APPELLEE, V. L. I. KEITH, APPELLANT.

FILED JANUARY 7, 1932. No. 28099.

Compromise and Settlement. One accepting a check, knowing it is offered in full settlement on an account or claim, is estopped to claim that deductions in the account were improperly made.

APPEAL from the district court for Frontier county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

K. F. Williams and *F. J. Schroeder*, for appellant.

Butler & James, contra.

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

CHASE, District Judge.

This is an action in replevin. L. I. Keith was defendant below, and for the purpose of this opinion will be termed defendant, and Lizzie Larson will be termed plaintiff.

The facts appear to be as follows: The plaintiff in her petition alleged a special ownership in the property replevied, by virtue of being the assignee of a certain chattel mortgage executed by the defendant to the International Harvester Company for the purpose of securing his note to them. The mortgage described various articles of farm machinery, together with "an undivided two-thirds interest in 65 acres of fall wheat now growing upon the premises." The defendant answered setting forth that the plaintiff had already taken possession of the defendant's interest in the 65 acres of wheat and sold the same, and there was enough money received from the sale thereof to satisfy the mortgage indebtedness, and consequently the note was fully paid. The plaintiff in her reply alleges that the wheat thus sold was to meet other obligations existing between the defendant and plaintiff, and that the same was converted into money and sold before the plaintiff became the owner of the note and mortgage, and that the plaintiff paid the defendant in full for his interest in the wheat prior to the time the plaintiff became the owner of the note and mortgage.

A jury was waived, and the issues of fact as well as law were submitted to the trial court. The trial court found in favor of the plaintiff and against the defendant. The defendant filed a motion for new trial, which was overruled, whereupon he presents this record to this court for review.

This is a companion case to *Larson v. Keith, ante,* p. 216, between the same parties, in which, although the action is of a different nature, the defense pleaded in this case is practically the same defense as was urged in that one, which was an action in forcible detention.

By stipulation of parties it was agreed that the chattel mortgage in question was executed and delivered by the

defendant to the International Harvester Company, and that the plaintiff, at the time of commencement of this action, was the owner of the said chattel mortgage and notes secured thereby, having taken the same by assignment. The evidence is practically the same as in the forcible detention proceeding, and the defense urged in this action, as we have stated, is substantially the same as he made in that proceeding; that the defendant was at that time the tenant of the plaintiff, and that they made a settlement in writing whereby the lease was terminated and certain appraisers were to be appointed in accordance with their agreement to appraise the value of the growing crop of wheat on the premises; that such appraisement was made; that the amount of indebtedness which the defendant owed the plaintiff was subtracted from the value of defendant's interest in the wheat, and the amount owing to the defendant, after deducting said indebtedness, was $107.75. The defendant gave plaintiff a bill of sale to all his interest in the wheat, and the plaintiff gave defendant her check, dated March 19, 1930, in the amount of $107.75, which was accepted by the defendant, upon which he afterward received full credit.

We see no reason to discuss the evidence generally, for the reason that in all essential features the case turns on the same question as *Larson v. Keith, ante,* p. 216. Suffice it to say that from the record here it appears that the defendant was indebted to the plaintiff prior to the time the plaintiff became the owner of the chattel mortgage in question; that the defendant, having already mortgaged to the International Harvester Company his interest in the wheat upon the premises, again sold and delivered the same property to the plaintiff by bill of sale. This all occurred before the plaintiff became the owner of the note and mortgage. The record discloses that the delivery of the bill of sale for the wheat by the defendant to the plaintiff was not intended to satisfy any obligation which was secured by the chattel mortgage, but was to satisfy obligations which the defendant owed the plaintiff as her tenant,

and after such obligations were satisfied he received from the plaintiff a check for $107.75, which he cashed and for which he received credit in full settlement of his interest in the wheat. It was after this settlement, to wit, on the 5th day of September, 1930, that the plaintiff became the assignee of the note and mortgage, purchasing the same from the International Harvester Company, and paying them therefor the amount of $379.88, which was received by the mortgagee. Therefore, it appears conclusively from the record that the settlement between these parties for the wheat in question was had and completed some months prior to the time the plaintiff became the owner of the note and mortgage. The defendant testifies that the transaction in which he conveyed his interest in the wheat to the plaintiff, on March 19, 1930, had nothing to do with the note and mortgage upon which this action is based.

It is unnecessary to reassert the principles of law applicable to the case, for the reason that the same have already been stated in the forcible detention action. The settlement made between the parties, in which the wheat was conveyed to the plaintiff, is a transaction fully closed and satisfied and cannot in any way be heard as a defense to this action. The judgment of the trial court is

AFFIRMED.

QUEEN INCUBATOR COMPANY, APPELLANT, V. NATIONAL SURETY COMPANY, APPELLEE.

FILED JANUARY 7, 1932. No. 27876.

1. **Indemnity Bond**: CONSTRUCTION. Where an indemnity bond contains several conditions, each in a separately numbered paragraph, and where condition No. 3 provides for the termination of the bond under stated conditions, and concludes with this sentence: "The right to give notice of a claim hereunder shall cease at the end of six months after the termination, expiration, or cancelation of this bond as to any employee," and where such time limit for giving notice is inconsistent with the provisions of another condition of the bond, such time limit is referable only to the classification stated in condition No. 3.

2. ———: ———. A contract of indemnity, issued by a surety company, will be most strongly construed against the company and in favor of the insured or obligee.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Reversed.*

Fred C. Foster and *William M. Holt,* for appellant.

Baylor & Tou Velle and *George A. Healey, contra.*

Heard before ROSE, GOOD and DAY, JJ., and MESSMORE and NISLEY, District Judges.

NISLEY, District Judge.

This is an action on a fidelity bond, to recover loss sustained on account of the defalcation of one of plaintiff's employees. The trial court sustained defendant's motion for a judgment on the pleadings and dismissed plaintiff's petition and cause of action. Plaintiff has appealed.

The controlling question for determination is: May an action be maintained upon the bond, where notice of the defalcation and resulting loss was not given to the bonding company until more than six months after the term of the bond had expired? Defendant contends that the giving of such a notice is a condition precedent to the right to maintain any action. Its contention is based on one of the conditions of the bond hereinafter quoted. Plaintiff, on the other hand, contends that the provision relied upon by defendant applies to only that class of cases referred to in condition No. 3 of the bond and that, unless its application is so limited, it is inconsistent with another condition of the bond which will be hereinafter set out.

The bond, after providing indemnity for loss occasioned by the misconduct of certain specified employees, contains 12 separate and distinct conditions, each in a separate paragraph, each separately numbered. Conditions No. 3 and the pertinent part of No. 4 are as follows:

"3. In the event of the death of any employee during the term of this bond; or of the suspension, dismissal, or retirement of any employee from the service of the em-

ployer during said term; or upon any employee entering into partnership relations with the employer, this bond shall thereupon terminate automatically as to such employee without any action on the part of the surety. The right to give notice of a claim hereunder shall cease at the end of six months after the termination, expiration, or cancelation of this bond as to any employee.

"4. Upon the discovery by the employer of any evidence of any dishonest act on the part of any employee, the employer shall, at the earliest practicable moment, and at all events not later than five days after such discovery, give written notice thereof addressed to the surety at its home office. Affirmative proof of loss under oath, together with full particulars of such loss, shall be filed with the surety at its home office within three months after such discovery and shall be verified and paid by the surety within sixty (60) days after receipt thereof."

The pleadings show that notice of defalcation and resulting loss was not given until more than six months had elapsed after the term of the bond had expired. In that behalf plaintiff alleged that it did not discover the defalcation until March 8, 1928, and that on the 9th of March, 1928, it gave notice to the defendant of the defalcation. Plaintiff further pleaded: "That plaintiff was without fault in its failure to discover said defalcations or any of them before March 8, 1928."

Condition No. 4 provides for notice not later than five days after the discovery of evidence of any dishonest act on the part of any employee; provides for proof of loss under oath within three months, and that the claim shall be paid by the surety company within 60 days thereafter. Nowhere in the provision is reference made to the six month's time within which to give notice of claim. If the time limit for giving notice of claim, provided in condition No. 3, was meant to apply to any claim under the bond, it certainly would be inconsistent with the provisions of condition No. 4. A careful reading of condition No. 3 leads us to believe that such time limit has reference to

claims under the classification set forth in condition No. 3. In the last sentence of condition No. 3, "The right to give notice of a claim hereunder shall cease," etc., the word "hereunder," as contended by defendant, means "under the bond;" as contended by plaintiff, it means "under the provisions of condition No. 3." We think the latter is to be preferred.

A somewhat similar question was before the court of Missouri in *Goffe v. National Surety Co.*, 321 Mo. 140, wherein it was held: "A provision in the fidelity bond that claims under it must be presented within three months after the expiration of its coverage, and another provision that the assured must give notice immediately upon becoming aware of an act of an employee affecting the liability of the surety company, and within sixty days after the discovery of the loss file itemized statements, are inconsistent where such discovery is not made within three months after the bond has expired."

Likewise, we are compelled to hold that, if the time limitation in condition No. 3 was intended by the defendant to apply to any claim under the bond, then it is inconsistent with condition No. 4, but we are of the view that, fairly construed, the limitation applies only to the class of cases mentioned and specified in condition No. 3. The pleadings do not show that plaintiff's claim arises out of or under any of the contingencies specified in condition No. 3. The time limit therein specified is inapplicable.

A bond of the character of the one sued on is in the nature of an insurance policy, and the rule of almost universal recognition, that the provision of a policy of insurance will be construed most strongly against the insurer and in favor of the insured, is applicable to a bond of this character.

Rulings on the admission and exclusion of evidence are complained of, but it is clear from the record that the entire rulings of the court were based solely upon the construction of the quoted provisions of the bond. The conclusion reached renders it unnecessary to further discuss these rulings.

Because of the erroneous rulings of the court, the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED.

CHARLES P. HALL, APPELLANT, V. LYMAN S. HALL ET AL., APPELLEES.

FILED JANUARY 7, 1932. No. 27943.

1. Insane Persons: APPLICATION FOR GUARDIANSHIP: SPECIAL PROCEEDING. An application to the county court by the children of a supposed incompetent for the appointment of a guardian for his estate is a special proceeding, not a civil action nor adversary in character.
2. ———: ———: DECREE: SUIT TO VACATE: FRAUD: PARTICIPATION OF PETITIONERS. In an action in equity to set aside a decree in such proceeding finding plaintiff incompetent and appointing a guardian, for fraud or upon other grounds of equitable cognizance, it is not necessary to prove participation by petitioners in the fraud or wrong, since they have no rights entitled to protection under the decree.
3. ———. ———: ———: VACATION OF DECREE. Where a supposed incompetent, being misled by the advice of his attorneys, makes no defense to proceedings in which he is charged with incompetency, and consents to the appointment of one of his attorneys as guardian, who secured substantial pecuniary benefits thereby, a court of equity will set aside such proceedings as for constructive fraud growing out of the confidential relation of attorney and client, even though, as in this case, the attorney acted in perfect good faith.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Reversed, with directions.*

Crossman, Munger & Barton, for appellant.

Charles E. Matson, John J. Ledwith, C. E. Sanden and *Bernard S. Gradwohl, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and REDICK, District Judge.

REDICK, District Judge.

This is an action in equity brought in the county court of Lancaster county, Nebraska, January 30, 1930, for the purpose of setting aside and canceling a judgment theretofore entered in said court on April 17, 1928, declaring the plaintiff an incompetent and appointing defendant John J. Ledwith guardian for the management of plaintiff's estate. No appeal was taken from such judgment, and this is an independent action to set it aside on the grounds of alleged fraud practiced by plaintiff's attorneys, defendants Ledwith and Charles E. Matson of the Lancaster Bar.

Prior to the guardianship proceedings, plaintiff was a farmer living on his homestead near Elmwood, in Cass county, Nebraska, for a period of over 50 years. His family consisted of his wife and nine children, all of whom are of age and none of them living at home at the time of these proceedings. His wife died in 1926. Plaintiff was and is the owner of personal property consisting principally of farm mortgages of the value of $100,000 and unincumbered real estate of the value of about $150,000.

January 4, 1928, plaintiff married Estelle G. Fowler, a widow 68 years of age. This lady was the mother of John Fowler, an officer of the Federal Trust Company of Lincoln, with whom plaintiff had done business exclusively for more than ten years in making investments in farm mortgages. Upon his marriage plaintiff went to live with his wife at her home in Lincoln, Lancaster county, taking with him his clothes and personal effects and securities, and continued to live there down to the present time.

On February 23, 1928, plaintiff's nine children filed a petition in the county court of Lancaster county, alleging that on account of plaintiff's advanced age, at that time 79 years, he was incompetent to transact business and care for his property, and prayed for the appointment of a guardian. Personal notice of these proceedings, together with a copy of the petition, was served upon the plaintiff, and upon the recommendation of Fowler, his step-son, plaintiff employed the defendant John J. Ledwith to rep-

resent him in said proceedings and defend against the application for the appointment of a guardian, and later on, at the suggestion of plaintiff, Mr. Charles E. Matson was employed as an attorney to assist Mr. Ledwith. A number of consultations were had between plaintiff and his attorneys, an informal inventory of his property was taken, and Mr. Hall's deposition was taken at the instance of the petitioning children in the presence of two doctors who, it appears, were present to observe the conduct and demeanor of the plaintiff while testifying. The deposition is not in evidence and we are therefore not informed of its contents.

The application came on for hearing before the county court on April 16 at 2 o'clock p. m. All of the petitioners with their attorneys, C. E. Sanden and Bernard S. Gradwohl, and the plaintiff and his attorneys, Ledwith and Matson, were present. Plaintiff was called as a witness by the petitioners and examined by their attorneys and by the court, but not cross-examined. About three hours were consumed in the examination, and at 5 o'clock the court adjourned until the morning of the 17th at 10 a. m. No further evidence was offered, and the county judge announced that he would find the defendant incompetent and appoint a guardian for his estate, but not for his person, and asked the plaintiff if there was any one he would like to nominate as his guardian. Plaintiff replied that he would like to have one of his attorneys, John J. Ledwith, appointed. Thereupon Mr. Ledwith was called and examined as to his qualifications and willingness to accept the appointment. Counsel for petitioners objected to the appointment of Mr. Ledwith on the ground that he had been the attorney of Mr. Hall, but the county judge, being fully convinced of the good character and ability of Mr. Ledwith, announced that he would appoint him guardian upon giving a bond in the sum of $100,000. Later in the day a decree was entered to that effect. Bond was duly filed and Ledwith took possession of the assets and continues to act as guardian, making regular reports to the court.

After the first day's hearing Ledwith and Matson had a consultation with the plaintiff, in the evening, at Ledwith's office, in which they informed plaintiff that the court would probably appoint a guardian, but that plaintiff had the right to nominate the person to be appointed, to which plaintiff replied that he wanted Mr. Ledwith, and did not want any one appointed by his children, and thereupon a written consent to the appointment of Mr. Ledwith was prepared and signed by Mr. Hall and filed in the county court the following morning.

For a year or more the guardian managed the estate without any objections from plaintiff, leasing the different portions of the real estate to some of the children, upon terms which, so far as the evidence shows, were usual and customary, and without objection by plaintiff until when plaintiff desired a certain 80 acres in Cass county to be leased to one Roden, which the guardian refused to do, having already leased it to one of plaintiff's sons for that year. This is the first and only dispute between the guardian and his ward regarding the management of the estate. An allowance of $500 a month, later reduced to $400, was made for the support of plaintiff by the county court, and paid to him.

January 30, 1930, the petition herein was filed in the county court against the nine children of plaintiff and the guardian, to set aside the guardianship proceedings upon two grounds: (1) That the plaintiff at the time was a resident of Cass county and that the county court of Lancaster county had no jurisdiction; (2) that the decree finding plaintiff incompetent and appointing a guardian over his estate was procured by fraud of plaintiff's attorneys. The petition alleges that plaintiff employed Ledwith as his attorney, and later Mr. Charles E. Matson, to resist the charge of incompetency; that he believed himself competent; that prior to the date set for hearing plaintiff's deposition was taken but no evidence was offered at the trial; that plaintiff's attorneys advised him that the proceedings could be terminated and his property handled

by guardian but not that such appointment required finding of incompetency; that, while guardian, Ledwith advised him to make a will wherein the Federal Trust Company, of which Ledwith was the attorney, was named as executor; that he executed the written consent to the appointment of Ledwith not knowing that a finding of incompetency was necessary; that he was not advised of any question of jurisdiction; that his attorneys stipulated with opposing counsel that plaintiff was a resident of Lancaster county; that Ledwith, as an inducement to sign the consent to his appointment as guardian, represented that he would handle the property as plaintiff wished, that the guardianship was a mere matter of form; that the form of the decree was determined by the attorneys without being submitted to him, and he had no knowledge of its terms until shortly before this suit was commenced; that his attorneys did not advise him of his right of appeal; that he was a resident of Cass county and the Lancaster county court had no jurisdiction; that, by reason of the above matters, his attorneys were guilty of fraud; that he is in fact mentally competent; and prays that the judgment may be set aside and canceled, and for general relief.

The children answered, admitting the court proceedings, taking of the deposition, filing of a stipulation as to residence, and denying all other allegations. They then allege that the plaintiff is incompetent, and a resident of Lancaster county. Ledwith answered, admitting he was duly appointed guardian, and that he represented Hall as an attorney in the county court, and denied all other allegations.

There was a general finding for defendants and dismissal by the county court, and an appeal taken to the district court, where the issues were separated, the questions of jurisdiction and fraud only being tried, and the question of competency reserved. The trial in the district court resulted in a general finding for defendants and dismissal of the suit, and plaintiff appeals.

1. Jurisdiction. It does not appear to us that there

was ever any serious question as to the jurisdiction of the county court of Lancaster county. As above stated, immediately upon his marriage plaintiff went to live at his wife's residence in Lincoln, January 4, 1928, and has resided there ever since, making only occasional visits to his old homestead, and plaintiff testified to those facts although he claimed to be a resident of Cass county and never intended to change that residence. Moreover he registered and voted as a resident of Lancaster county. The question of jurisdiction may therefore be dismissed without further consideration.

2. Fraud. Let it be observed that we are not called upon to determine the competency of plaintiff to care for his property and transact business; the county court having jurisdiction and no appeal having been taken from its judgment, for present purposes it must be presumed that it acted upon sufficient evidence, though it must be remembered that no evidence was offered on behalf of the supposed incompetent. The only charge of fraud connected in any way with the children or their attorneys has reference to the stipulation as to residence of the plaintiff and the form of the decree. As to the former, we have seen that there was no real question of jurisdiction, and that the stipulation was in accordance with the fact; as to the latter, plaintiff's only complaint seems to be that he was not furnished with a copy of the decree nor consulted as to its form. It may be stated with full confidence that there is an entire absence of any evidence warranting an inference that the petitioners or their attorneys connived in any degree with defendant's attorney Ledwith; neither is there any suggestion impugning the good faith of the county judge or his conscientious performance of his duties.

The case, therefore, rests solely upon charges of fraud against plaintiff's attorney Ledwith, which are stated to be his failure to introduce any evidence in opposition to the appointment of a guardian, his failure to advise plaintiff that the appointment could only be based upon a finding

of incompetency, his procuring the written consent of plaintiff to his appointment as guardian, his signing a stipulation as to plaintiff's residence, his advising plaintiff to make a will in which the trust company, of which Ledwith was the attorney, was named as executor, his representation that the guardianship was a mere matter of form and that he would handle the property as plaintiff wished, that Ledwith and Matson overcharged plaintiff for their services in the guardianship proceedings, and that he failed to advise plaintiff that he had a right to appeal.

Assuming, as plaintiff claims, that he was at all times competent in every way, we are forced to the conclusion from a careful consideration of the evidence on the point that he knew that he was charged with incompetency and that the appointment of a guardian had its dependence upon that fact. He read the copy of the petition served upon him with the notice, he employed defendant Ledwith to contest the application, and was present in court when the judge announced that he would find him incompetent and appoint a guardian of his choosing, if qualified. We also think it is established that Ledwith and Matson, on the evening before the appointment of a guardian, advised the plaintiff that the court would find him incompetent and make the appointment; also that plaintiff understood what he was doing when he signed the written nomination of Ledwith as guardian. It does not necessarily follow that because the plaintiff, on account of his age, appearance and testimony before the county court, was found incompetent to transact business and properly take care of his property and that a guardian should be appointed, he was unable to understand and appreciate the effect of his actions above referred to. We must confess that careful consideration and study of plaintiff's testimony given in this case furnishes little if any ground for an inference of incompetency; on the contrary, his answers to questions, though sometimes contradictory, are direct and to the point, as much so as those of any ordinary witness in the trial of a case. It further appears from the evidence that he was not averse

to having some one appointed to take care of his property, but he talked of a supervisor or power of attorney, and the gravamen of his complaint at this time is the finding of the county court that he was incompetent, which he seems to consider equal to a finding that he was crazy or insane.

He produces no evidence of mismanagement of his estate by the guardian and makes only two complaints in that regard, one that the guardian leased 80 acres in Cass county to plaintiff's son instead of an old friend of the plaintiff, and that the guardian had paid some $600 in taxes which he claims should have been paid by some of his sons, lessees upon his farms. These matters have to do only with the management of the estate and do not touch the question of fraud. In answer to a question whether he knew of a single fraud that Mr. Ledwith had perpetrated upon him, he answered: "I have never claimed that he committed a fraud. No, sir. That haint my contention now." And in answer to the question, "Now, what objection do you have against Mr. Ledwith?" he answered, "Nothing. I have nothing against the man, only he haint a business man and he don't carry on property the way it should to be of any benefit to me at all. He don't understand stock and he didn't know nothing about stock after I had invoiced the stock. And he don't know who had any apparently, and he didn't know what was cattle or hogs or horses, whether they was or not. He didn't know a hog from a horse, I don't think." He gave much more testimony to the same effect, but offered no instances of mismanagement. The irresistible conclusion from his testimony is that he does not like the finding of the county court that he was incompetent to transact business and care for his property, and wants to have it wiped out and have the management of his property returned to himself; that his attorneys did not properly defend the application and had misled him into consenting to the appointment of a guardian.

The only method by which the present desires of plaintiff may be accomplished is by a suit in equity such as this to set aside the decree of the county court as having been

obtained by fraud, actual or constructive, and as it happens here, the only persons, if any, guilty of fraud are his attorneys in the guardianship proceedings.

Plaintiff's attorneys in their brief frankly state their position in the following language: "We desire to be perfectly fair to Mr. Ledwith, and do not question but that he was, in his own mind, fully justified and felt conscientious in doing what he did. But if what he did was not justified under the strict and rigorous standards to be strictly applied to fiduciaries then it matters not if he mistakenly considered that his standards were as high as those the law requires. In many other trusts and fiduciary relationships, as well as those of guardian and ward and attorney and client, it is absolutely forbidden by law for the fiduciary to take action where his interest is adverse to that of his client, ward or beneficiary of the trust." We greatly appreciate the conscientious attitude of counsel which dictated the above statement; therefore, in further consideration of this case, we take it as conceded that no charge of intentional fraud or misconduct is made against Mr. Ledwith, and that the claim of plaintiff rests upon the proper legal deductions to be made from the facts disclosed by the evidence.

Although there may be some contradictory testimony in the record, the facts upon which our judgment must rest are practically without dispute and present to our view the following picture:

Plaintiff was an old gentleman of 79 years; he had been a farmer for over 60 years, and by hard work, the assistance of his wife and children, frugality, and by the wise investment of his surplus funds, had acquired an estate of the value of about $250,000. In 1926 his wife died, and about two years later, January 4, 1928, he married a widow lady about 68 years of age and removed from the old homestead in Cass county to Lincoln, Lancaster county, and has lived there ever since in a house belonging to his wife. February 23, 1928, a petition was filed by his nine children to have him declared incompetent, and for the appointment

of a guardian, a copy of which petition was served upon the plaintiff with the customary notice. Shortly thereafter, upon the recommendation of his step-son, he employed the defendant, John J. Ledwith, as his attorney, to contest said proceedings, and afterwards Mr. Charles E. Matson was joined as associate counsel. His attorneys took no steps to procure evidence as to the mental competency of plaintiff, but took an inventory of his estate and made provision for the safe-keeping of his securities. Prior to the hearing in the county court, plaintiff's deposition was taken at the instigation of the children, in the presence of two doctors and plaintiff's attorneys. Many consultations were had by plaintiff and his attorneys, and the latter came to the conclusion that their client was incompetent and that a guardian should be appointed. April 16, 1928, the matter came up for hearing in the county court. Plaintiff was called as a witness by the petitioners, was not cross-examined by his attorneys, and no witnesses were called by them. The session, lasting two or three hours, was adjourned until 10 o'clock the next morning. That evening a consultation was had by plaintiff and his attorneys. The attorneys testified that plaintiff declared that he would not go back to court and testify any further. It seems that the attorneys did not inform plaintiff of their opinion as to his competency, but they did advise him that the court would probably find him incompetent and appoint a guardian, and that plaintiff would have a right to name the guardian, and plaintiff said he wanted Mr. Ledwith. Thereupon a written request for the appointment of Ledwith as guardian was prepared and signed for plaintiff by his attorneys and contained the following: "That in order to avoid the disagreeableness of litigation and expense that will necessarily be incurred, requests the court to appoint as guardian of his estate and property, both real and personal, John J. Ledwith of Lincoln, Nebraska." It was then, at that time, suggested by Ledwith and Matson that the fees for their services in the guardianship matter should be determined, and named the amount of $7,500, to which the plaintiff agreed. The follow-

ing morning, the parties and attorneys being in court, the county judge, without further evidence, announced that he would find plaintiff incompetent and appoint Ledwith guardian, having asked plaintiff his preference in that regard. On the same day decree was entered, and very shortly Ledwith qualified as guardian, giving a bond in the sum of $100,000.

April 23, 1928, Ledwith advised Hall to make a will, which he did, disposing of his property in the same manner that the statute would have distributed it in case of intestacy, and appointed the Federal Trust Company of Lincoln, executor. Plaintiff's step-son, Fowler, was an officer of the trust company and Ledwith was its attorney.

Management of the estate by the guardian proceeded without protest for over a year, when some minor disputes arose, as elsewhere stated. This action was brought about a year and ten months after the decree of the county court, and the question for our determination is whether the facts above related are sufficient to require setting aside the judgment of the county court on the ground of fraud or under any other recognized head of equity jurisprudence. The suit is not brought under the statute, section 20-2001, Comp. St. 1929, "for fraud practiced by the successful party in obtaining the judgment or order," but appeal is made to the general powers of a court of equity. The statute is not exclusive but declaratory of the equitable powers of the court at the time of its enactment. *In re Estate of Kelly,* 103 Neb. 513; *Kulhanek v. Kulhanek,* 106 Neb. 595.

A number of cases are cited by appellee to the point that fault or fraud upon the part of plaintiff's attorneys is not ground to vacate a judgment after the term at which it was rendered, in the absence of participation by the successful party, among them *Kulhanek v. Kulhanek,* 106 Neb. 595, *Brandeen v. Beale,* 117 Neb. 291, and *Funk v. Kansas Mfg. Co.,* 53 Neb. 450, and therefore the general proposition may be considered as established law in this jurisdiction. From this premise it is argued that, inasmuch as no claim is made of participation by the children in the

supposed fraud, the action cannot be maintained. All but two of the cases cited were of an adversary character and are based upon the reasoning that one in whose favor a judgment had been rendered may not be deprived of its benefits by the fraud or neglect of opposing attorneys to which he has not contributed. One of the exceptions referred to is the case of *McCormick v. McCormick,* 109 Ia. 700. That was a petition, under a statute providing that a judgment might be vacated after the term for fraud of the successful party in obtaining same, or for inevitable casualty or misfortune preventing the party from defending, to set aside a decree finding the plaintiff incompetent and appointing a guardian on the ground of fraud practiced by the successful party in procuring said judgment. The charge of fraud was against the petitioner and another for conspiring to obtain the decree, plaintiff claiming to have been misled by her counsel and others into not making a defense, and relief was denied for failure of proof of any fraud; that the mere failure of the attorney to interpose a valid defense to the application was not sufficient to warrant the vacation of the judgment; the attorney received no financial benefit from the decree, no charge of fraud was made against the attorney, and no question arising out of the fiduciary relation existing between attorney and client was involved. In discussing the other ground urged for setting aside the judgment—unavoidable casualty or misfortune preventing plaintiff from defending—it was said: "Again, fraud and negligence of an attorney in not interposing a valid defense is not ground for vacating a judgment and granting a new trial"—citing *Jones v. Leech,* 46 Ia. 186; *Jackson v. Gould,* 96 Ia. 488. But these cases were both ordinary actions to which the principle was clearly applicable. The second exception, *Brandeen v. Beale,* 117 Neb. 291, will be referred to later.

It seems to us, however, that there is a distinction between the case we are considering and those of an adversary character where the enforcement of the rule is requisite to protect the rights of the litigants. A petition

for the appointment of guardian for an incompetent is not a civil action but a special proceeding. 28 C. J. 1082; *Lawrence v. Thomas,* 84 Ia. 362. It is not an adversary proceeding. *Huffman v. Beamer,* 198 Ia. 1113. "The situation in a guardianship proceeding is, of course, anomalous, for in one sense there are not two antagonistic sides to it. The person who by petition arouses the jurisdiction and duty of the county court may have nothing inimical in sentiment or interest to the alleged incompetent. He may be actuated purely by a desire * * * to protect the public at large. Nevertheless, he, by his own volition, assumes an attitude of practical antagonism to the freedom of the other, however benevolent his motives;" this for the purpose of service of notice of appeal on the "adverse party." *In re Guardianship of Welch,* 108 Wis. 387. The term "adverse" involves element of hostility under claim of title. 2 C. J. 35. The petitioners, as heirs of the defendant have no property rights to be protected, but the proceeding is one for the benefit and protection of defendant and the preservation of the estate. The reason of the rule fails when its application is sought to a proceeding of this character. The petitioners obtained a decree of incompetency and the appointment of a guardian, and while they have accomplished their desire in the matter, they cannot be accurately described as the successful party because they had no interest to protect and received no benefit for themselves; the real successful party is the incompetent whose property is thus preserved from his own inconsiderate acts and the inroads of designing persons. True, in *Brandeen v. Beale,* 117 Neb. 291, it was held that an application to set aside a judgment "for fraud practiced by the successful party in obtaining the judgment" applies to a proceeding of this character, and that the petitioner might be treated as the "successful party," but in that case fraud was charged against the petitioner and the action failed by the application of the special statute of limitations. In a proceeding based upon the statute, the party obtaining the order complained of may be treated as the successful party, but where the pro-

ceeding is based upon an independent ground of equitable jurisdiction other elements may control the definition. We are therefore of opinion that the rule contended for should not be applied strictly to the present situation, especially in a proceeding not based exclusively on the statute.

The contention of plaintiff is that, by reason of the confidential relations between himself and his attorneys, and his reliance upon their advice, in ignorance of the fact that in order to have a guardian appointed a finding was necessary that plaintiff was incompetent, he was prevented from contesting that question before the county court and induced to consent to the appointment of his attorney as guardian, as the result of which the attorney secured a very large fee, a position as guardian which would pay him about $1,000 a year, and probable employment later on as attorney for the trust company in the management of his estate after the death of plaintiff.

We, therefore, have a case where the attorney conscientiously concluded that any defense against the petition would be of no avail and therefore presented none, but who secured or accepted for himself, as a consequence or result of the decree, considerable financial benefit. Are these facts of such a character that a court of equity should take cognizance of them and interpose its remedial arm to prevent injustice? In *Berman v. Coakley,* 243 Mass. 348, it was said: "The relation of attorney and client * * * is highly fiduciary in its nature. The attorney is not permitted by the law to take any advantage of his client. * * * The defendant is alleged to have received large sums of money from the plaintiff. * * * That circumstance, together with the existence of the trust relation * * * arising out of that relation * * * is enough to warrant the interposition of equity to adjust the relation between the parties. * * * The existence of the trust relation goes far toward justifying relief in equity for abuse of the confidence thus reposed in respect to financial transactions." That was an action against the attorney for an accounting, but the statement is a correct exposition of the relations between attorney

and client. See, also, *Hamilton v. Allen*, 86 Neb. 401; *Schneider v. Lobingier*, 82 Neb. 174.

And the presumption is not met or defeated by the fact that the attorney acted in the utmost good faith and according to his best judgment. *Raimondi v. Bianchi*, 100 N. J. Eq. 448, citing *Dunn v. Dunn*, 42 N. J. Eq. 431. That was a suit to set aside a transaction between attorney and client and to charge the attorney with profits made therein, and the court said (p. 436): "And it does not follow that in any such case the act or advice of the counsel may be dishonest or fradulent—not in the least, for the law does not proceed on such basis at all, since, if the act be either fraudulent or dishonest, the remedy therefor is abundant and proceeds on totally different grounds; but, in such cases as the present one is claimed to be, the courts administer relief because of undue influence, that influence which blinds, misleads and prevents all further inquiry. * * * In other words, public policy sets its face against such things." And again (p. 438): "As I have said above, it is not on the ground of actual fraud that courts interfere, but simply because of the fiduciary relation that is shown to have existed, and it not being made to appear that the transaction * * * was perfectly fair and just. Weeks, in his work on Attorneys at Law, says: 'The rule is on the ground of public policy, not of fraud, and prevails although the attorney may be innocent of any intention to deceive, and act in good faith.'"

We are of the opinion that the fee of $7,500 charged by plaintiff's attorneys and paid by plaintiff is greatly excessive, and the suggestion of appellee Ledwith that whether or not such charge was reasonable cannot be an issue in this case but will be met at the proper time and place is inadmissible in our opinion, in view of the time and circumstances surrounding its settlement. If plaintiff was incompetent as the attorneys thought, clearly he would not be bound by the agreement; if competent, it being a transaction between attorney and client, it is a proper subject of inquiry by a court of equity whether or not it was fair

and reasonable. Moreover, we are unable to say what effect, if any, the agreement for so large a fee may have had upon the judgment of the attorney as to the propriety or necessity of making a defense in the county court.

Notwithstanding the above criticism of counsel regarding the amount of their fee or the other dealings of the plaintiff with defendant Ledwith, we do not wish to be understood as holding that the attorneys were guilty of any intentional fraud; in fact, they are gentlemen of very high reputation, both as to legal ability and character. What we do hold is, that plaintiff had a legal right to have a defense made on the question of his competency, and conceding that the attorneys acted in the best of faith in failing to make such defense, having reached the conclusion that it would be useless, nevertheless plaintiff was misled by their advice, and is without remedy unless it is afforded by a court of equity. An action against the attorneys for a reexamination of the reasonableness of their charge is not adequate, as plaintiff would still be, under the decree, an incompetent. The situation presents a case of constructive fraud growing out of the confidential relation of attorney and client. The only person having a legal interest is the plaintiff (*Timonds v. Hunter*, 169 Ia. 608) whose right to possession and control of his property has been taken away without his having an untramelled opportunity to be heard. The children, as above noted, have no rights to be protected by the decree attacked, and have no standing in court to object to the relief prayed for by plaintiff; no one can be wronged by granting of plenary remedy to him. *Timonds v. Hunter, supra.*

The situation of plaintiff is well pictured by Evans, J., in *Huffman v. Beamer*, 198 Ia. 1113: "The premature quarrels of expectant heirs are thrust upon the natural repose due to old age, and often result in despoiling the common benefactor and in destroying his status, and in depriving him of the liberty to do as he will with his own, and in compelling him to eat his own substance out of a stranger's hand."

We conclude that the judgment of the district court is erroneous and the same is reversed, with directions to try and determine the question of competency of plaintiff, and, if found incompetent, render judgment dismissing the action; if found competent, to enter judgment for plaintiff vacating the judgment of the county court dated April 17, 1928, and remanding the case to the county court, with instructions to make final settlement of the guardian's account, discharge the guardian and order the return of the property in his possession to plaintiff.

REVERSED.

JESSE KOCHENTHAL ET AL., EXECUTORS, APPELLANTS, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED JANUARY 8, 1932. NO. 28034.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed, with directions.*

Morsman & Maxwell, for appellants.

Edward J. Shoemaker, contra.

Heard before ROSE, GOOD and DAY, JJ., and FROST and MESSMORE, District Judges.

PER CURIAM.

This is an action to recover damages resulting from an unlawful trespass on real estate. From a judgment in favor of the defendant in the trial court, the plaintiffs appeal.

The plaintiffs claim that the defendant trespassed on the real estate by fastening to the front wall of the second floor a guy wire supporting the trolley wires used by the defendant in the operation of an electric railway system; that the strain from this wire and the jarring from the use thereof by the defendant in the operation of its cars damaged the wall of the building; that the damages were $325 which was the expense of repairing the wall. The

defendant admits that it attached its wire to plaintiffs' building, but denies that any damage resulted therefrom, and alleges that the repairs necessary to the wall were not at the place of attachment or caused by said attachment.

One assignment of error is that the court permitted the defendant's witness, Edgecomb, to testify to statements which he claimed he made to one of the plaintiffs to the effect that he was of the opinion that the damage to the plaintiffs' wall was not caused by the attachment of the wire by defendant but was rather caused by the deterioration of the brick wall. The expert testimony of the witness Edgecomb at the trial states his opinion in the same language and to the same effect as he testifies he stated it to the plaintiffs at a previous time. There are good reasons why the testimony complained of should have been excluded, but since it was an expression of an opinion by an expert, identical with his opinion given at the trial, its reception was not prejudicial to the plaintiffs.

It is also contended by the plaintiffs that the cross-examination of witnesses was unduly restricted. The cross-examination of the witnesses of the defendant was relative to the number of supports for the trolley wires on Douglas street for a distance of a block from the building and the trolley wire involved in this case. This court is of the opinion that the proposed cross-examination was too remote to be material to the issues in this case and that in this respect the limitation of the trial court was not an abuse of its discretion.

The petition alleged the trespass on the part of the defendant on plaintiffs' property, while the answer admits the trespass. The defendant having admitted the trespass, the court should have instructed the jury to return a verdict for nominal damages and failure to so instruct was error. The petition alleged that plaintiffs' property had been damaged by the trespass to the extent of the cost of repair and the prayer was for exactly the said amount. The defendant denied any damage to the building caused by its trespass. This question of substantial damages was sub-

mitted to the jury under proper instructions and the verdict responsive thereto was in favor of defendant. There is no error which requires the resubmission of this case to a jury.

However, since under the pleadings the trial court should have instructed the jury to return a verdict at least for nominal damages, the judgment is reversed and the cause remanded, with directions to the trial court to enter a judgment in favor of the plaintiffs for a sum not exceeding $1.

REVERSED.

CORNELL SUPPLY COMPANY, APPELLANT, V. CHARLES A. GILLILAND, APPELLEE.

FILED JANUARY 8, 1932. NO. 28035.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Fred C. Foster and *William M. Holt,* for appellant.

Mockett & Finkelstein, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and WRIGHT, District Judge.

PER CURIAM.

In this case the plaintiff and appellant sued the defendant, a former traveling man, for a balance of $169.68 due on two chattel mortgage notes, which he had given in payment of automobiles required by him to travel for them. The defendant denied the amount claimed upon said notes was the correct amount, and for a counterclaim set out that he was entitled to $200 commission on sales made for plaintiff. The case was tried to a jury, and the jury found that there was $130.45 due to the plaintiff on the notes, and that there was $200 due to the defendant on his counterclaim, and therefore rendered a judgment for the difference of $69.55 for the defendant.

The errors set out for reversal were that the verdict was not sustained by sufficient evidence and the court erred

in certain rulings in the admission of evidence and in the giving of instruction No. 6. This instruction reads as follows:

"The contract under which the defendant began working in 1928 provided for a bonus upon all merchandise sold over and above $55,000 of 4 per cent. on $10,000 and 2 per cent. on the balance. There is no controversy that the net sales made by the defendant amounted to $69,184.46. The controversy in this case, however, is whether the amount of sales before defendant was entitled to a bonus under the new arrangement made in March, 1928, whereby the defendant took other territory, was changed from $55,000 to $70,000, and you are instructed that the burden is upon the plaintiff to establish that the quota was changed by a preponderance of the evidence, as that term is hereinbefore defined."

The plaintiff, in its answer to the counterclaim of defendant, alleged: "The plaintiff and defendant modified said written contract by agreeing verbally to a change in the territory and the quota of merchandise to be sold by the defendant before he became entitled to a bonus."

The burden of proving this allegation was placed upon the plaintiff very properly by instruction No. 6, and this court sees no error in that instruction. There was a sharp contest on questions of fact, which were decided by the jury, and there is sufficient evidence to sustain the verdict. No question of law is submitted which has not heretofore been determined by this court. The judgment of the lower court is

AFFIRMED.

IN RE ESTATE OF LIZZIE FRELING.
CHARLES C. HAYNES, ADMINISTRATOR, APPELLANT, V. ROY W. MATSON, EXECUTOR, APPELLEE.

FILED JANUARY 8, 1932. No. 28135.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

B. N. Robertson, for appellant.

Crofoot, Fraser, Connolly & Stryker and *William A. Ehlers, contra.*

Heard before ROSE, GOOD and DAY, JJ., and FROST and MESSMORE, District Judges.

PER CURIAM.

This is an appeal from a judgment approving the final supplemental report of an executor and the order discharging him and exonerating his bond. This case has heretofore been before this court (*In re Estate of Freling,* 119 Neb. 605) to which reference is made herein. The former appeal was from the approval of the final report of the executor by the county court. The report was that the estate was without funds to pay claims. It appears that the only asset of the estate now involved is an interest in the estate of decedent's deceased husband, no part of which, reported the executor, came into his possession. The district court found that there was property of the estate of the husband of the reasonable value of $1,012.28. The trial court found that no prudent attempt had been made by this executor to collect this asset from the other estate, and that the executor was chargeable with the value thereof, $1,012.28, less any lawful deductions on account of claims and expenses of administration in that estate. This order is not ambiguous and its import is apparent. The court found that the executor had been negligent in securing collection of assets, found the value of such assets and charged him therewith as executor. This executor could only be chargeable with the amount coming from the other estate, so the court added the provision that the charge should be the value of the property, less proper charges against it in that estate. In fine, the money would come to this estate, less all proper charges against it in the other estate. This was the only judgment which could be entered because the administration of the husband's estate was still pending at the time. This judgment was affirmed by this court and the mandate issued. Pursuant to the terms

of the mandate, the executor filed this supplemental report, charging himself with the $1,012.28, as provided, and setting out as deductions the claims filed in the other estate, together with the costs of administration therein. The county court had entered a decree finding that there were no funds in the hands of the administrator of the husband's estate and that claims and cost of administration were largely in excess of $1,012.28. It found upon a hearing upon this report that the claims and costs of administration exceeded the sum of $1,012.28 in the husband's estate. The county court thereupon approved the supplemental final report, which was also approved by the district court upon appeal. This is in accord with the mandate issued upon the former appeal. This charge was made against the executor on account of his neglect of duty. It is sophistry to say that, because these claims against the other estate were not paid, they cannot, under our former decision, be deducted. Obviously, if this inexperienced executor had been diligent and secured the collection of this money by the administrator of the husband's estate, these valid claims against that estate would have consumed it, so that not one dollar of it would have reached this executor. Therefore, it is meet, just and proper that the charge against him for negligence should be limited, as provided by the trial court in the former appeal and affirmed by this court, to the amount that diligence on his part would have collected for this estate. The judgment of the trial court and the county court approving this supplemental final report, discharging the executor, and exonerating his bond, is altogether a righteous judgment.

AFFIRMED.

EMMA TEMPEL, APPELLANT, V. JONAS F. PROFFITT ET AL., APPELLEES.

FILED JANUARY 8, 1932. No. 27995.

1. **Negligence:** CONTRIBUTORY NEGLIGENCE. The mere fact that one rightfully using a stairway, which it is the duty of the

owner to keep in reasonable repair, is aware of a defective condition of the steps and is injured by reason thereof does not as a matter of law amount to such contributory negligence as to defeat a recovery, if it reasonably appears that he might safely use such steps with the exercise of due care.

2. ———: TRIAL: INSTRUCTIONS: COMPARATIVE NEGLIGENCE. Where the jury may rightfully infer from the evidence that the defendant was negligent and that the plaintiff was guilty of any negligence directly contributing to the injury complained of, it is the duty of the court to instruct the jury on the comparative negligence of the parties. Comp. St. 1929, sec. 20-1151.

3. ———: CONTRIBUTORY NEGLIGENCE: PLEADING AND PROOF. The burden is on the defendant to plead and prove contributory negligence of the plaintiff.

APPEAL from the district court for Adams county: J. W. JAMES, JUDGE. *Reversed.*

James D. Conway, for appellant.

Stiner & Boslaugh, Edmund P. Nuss and *G. W. Bolin, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

GOSS, C. J.

This is an action for damages for personal injuries. Negligence is charged and contributory negligence of plaintiff was an issue. Verdict and judgment were for defendants. The jury were not instructed on the subject of comparative negligence. Comp. St. 1929, sec. 20-1151; *Morrison v. Scotts Bluff County,* 104 Neb. 254. They should have been instructed on that subject, unless the evidence of negligence of defendants was legally insufficient or unless the contributory negligence of plaintiff required a verdict for defendants. *Day v. Metropolitan Utilities District,* 115 Neb. 711; *Traphagen v. Lincoln Traction Co.,* 110 Neb. 855; *Baker v. Omaha & C. B. Street R. Co.,* 110 Neb. 246, 249; *Casey v. Ford Motor Co.,* 108 Neb. 352; *Francis v. Lincoln Traction Co.,* 106 Neb. 243; *Robison v. Troy Laundry,* 105 Neb. 267.

There was evidence to show that plaintiff, an employee

of a tenant of defendant owners, on an errand for her employer, when injured, was using a stairway which was the only means of going to and from the second floor, where she was employed; it was the duty of the owners to keep the stairway in reasonable repair; some of the steps had been in a defective condition for some time and plaintiff was aware of that fact, but defendants were not; plaintiff was injured by reason of a defective condition of one of the steps. The evidence does not show affirmatively that the plaintiff was not exercising due care when she was injured, unless the mere fact that she was injured in the circumstances stated requires that conclusion.

Section 568, 16 R. C. L., 1049, says: "Even though it is the duty of a landlord to keep the portions of his premises under his control in reasonably safe condition, the right of the tenant to recover for injuries caused by defects thereon may be barred by reason of his contributory negligence. * * * It is generally held, however, that the mere fact that a tenant is aware of the defective condition of a portion of the premises which it is the duty of the landlord to repair does not as a matter of law make it contributory negligence to continue the use of the same, if it reasonably appears that he might safely do so with the exercise of care. Thus, the fall of a tenant in a tenement house, caused by a hole in a stair carpet, does not as matter of law show contributory negligence, although he knew of the holes in the carpet and the stairway was well lighted at the time." The duties and liabilities of a landlord to his tenants in such matters extend to an employee of a tenant. 16 R. C. L. 1067, sec. 588.

We cannot say that reasonable minds could come to no other conclusion than that plaintiff was shown by the evidence to be guilty of more than slight negligence and that judgment must have been rendered by the court in favor of defendant, as in *Frye v. Omaha & C. B. Street R. Co.*, 106 Neb. 333; *Haffke v. Missouri P. R. Corporation*, 110 Neb. 125; *Tyson v. Missouri P. R. Corporation*, 113 Neb. 504. Nor do we think *Grandorf v. Detroit Citizens Street*

R. Co., 113 Mich. 496, strongly urged by defendant, is controlling here. There the court charged the jury that plaintiff was guilty of contributory negligence and could not recover. But there the stones were in a public street; plaintiff saw and knew all the risks; she had a choice of ways and knowingly chose a dangerous way. Here the plaintiff had no choice of ways because there was only one stairway; the risks were not so plain; it appeared safe to use the stairs by exercising care. Whether she was guilty of contributory negligence and, if so, whether it was more than slight, was a matter for the jury to weigh in the light of all the circumstances. See the negligence cases systematically annotated under "c. Hall and Stairway Carpeting" and "d. Protruding nails, screws, etc." in the following American Law Reports, annotated: 25 A. L. R. 1307, 1310; 58 A. L. R. 1418, 1419; 75 A. L. R. 166.

So, we hold that the failure of the court to instruct the jury on the subject of comparative negligence was prejudicial to the plaintiff.

By the fifth paragraph of his first instruction to the jury, the court placed upon the plaintiff the burden of proving by a preponderance of the evidence that the action was not caused by nor the result of her own negligence. While it is true that the jury may derive its conclusion of facts from all the evidence, whether submitted by plaintiff or defendant, yet the burden is on defendant to prove the contributory negligence of plaintiff. For that is its defense to plaintiff's plea and proof of negligence.

For the reasons stated, the judgment of the district court is reversed and the cause remanded.

REVERSED.

GUS LINN, APPELLEE, V. ARTHUR R. MARSHALL, APPELLANT.

FILED JANUARY 8, 1932. No. 28057.

1. **Sales: ACTION FOR PRICE: VERDICT: SUFFICIENCY OF EVIDENCE.** Evidence outlined in opinion *held* sufficient to sustain a jury's finding that plaintiff and defendant, for the price of

$175, entered into a contract for the sale and purchase of a potato picker which plaintiff delivered to defendant.

2. Appeal: CONFLICT OF EVIDENCE. On an issue of fact, where the testimony is conflicting, the finding of the jury, if supported by sufficient evidence, will not be disturbed on appeal.

APPEAL from the district court for Kimball county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

S. E. Torgeson, for appellant.

Roland V. Rodman and *John H. Kuns, contra.*

Heard before ROSE, GOOD and DAY, JJ., and FROST and MESSMORE, District Judges.

ROSE, J.

This is an action to recover $175, the purchase price of a potato picker which plaintiff alleged he sold and delivered to defendant. In an answer to the petition defendant denied that he made the purchase. The action was defended on the theory that the minds of the parties never met on a contract of sale or on terms of purchase, defendant pleading in effect that negotiations on his part went no further than an offer to order the latest improved type of potato picker sold by plaintiff after a successful demonstration with an implement of the same make in the soil in which defendant raised potatoes, a test never made. Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for the full amount of his claim with interest—$192.95. Defendant appealed.

The controlling question for review is the sufficiency of the evidence to sustain the verdict in favor of plaintiff. The record shows that the evidence would sustain a finding in favor of defendant, who testified frankly to facts showing his understanding that the negotiations did not result in a contract of sale, but the jury believed testimony of a different import. It is clear both parties understood that plaintiff did not warrant the potato picker to work and that defendant was anxious to get one that would pick potatoes in his fields. The record contains evidence tend-

ing to prove the following facts, in substance: At plaintiff's store defendant inquired about a potato picker and asked to be notified when and where he could see demonstrations. He was informed the cash price was $175 and that the potato picker would be demonstrated on some of the farms in the vicinity. Later defendant witnessed two actual experiments in different potato fields in the neighborhood of his farm. In one of the places the potato picker did not work and he discussed with the operator the reasons why it would not perform in the soil of that particular field. It would work in some soils. Defendant said he thought it would work in his potato fields and ordered one of the potato pickers. He was told there was none in stock at plaintiff's store, but that an effort would be made to procure one for him. Afterward two of the latest potato pickers of the same type as the one demonstrated were brought from Scottsbluff and one of them was delivered to defendant at his farm in Kimball county. Defendant used it in picking two acres of potatoes, but it failed to work in another potato field, though he had put on an attachment and had made repairs. He did not return the potato picker, but abandoned it on his farm without notifying plaintiff where he had left it. The facts outlined, when believed by the jury, were sufficient to sustain a finding that defendant purchased the potato picker delivered to him by plaintiff. With the controlling issue of fact thus determined, prejudicial error in the proceedings and judgment below has not been found in the record.

AFFIRMED.

EMMA L. HIGGINS, APPELLEE, V. OLD LINE INSURANCE COMPANY, APPELLANT.

FILED JANUARY 8, 1932. No. 28016.

1. **Insurance: FORFEITURE: WAIVER.** Evidence examined, and *held* that, by its conduct, the insurance company waived the right to strict enforcement of the forfeiture provisions of an extension premium note.

2. ———: ———: ———. A provision that a policy shall be forfeited if a premium note is not paid upon maturity is for the benefit of the company, and may be waived by the insurer.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

King & Haggart, for appellant.

McElfresh & Walker, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

DAY, J.

This is an action to recover upon a life insurance policy. The insurance company appeals from a judgment in favor of the beneficiary.

The company insured the life of the son of the beneficiary and received the premiums for the first and second year and the first semiannual of the third year. The policy provides that it shall lapse, unless the premium is paid when due or within a 31-day grace period. The semiannual premium in this case was due February 2. It was not paid when due, but during the 31-day grace period the insured sent the company $10. The letter of the company acknowledging receipt of this remittance shows the application made thereof:

"Lincoln, Nebraska, March 3, 1930.

"Carl P. Higgins,
"Schuyler, Nebr.
"Dear Mr. Higgins:

"We are in receipt of your remittance in the sum of $10 to be applied as part payment on the semiannual premium on your policy No. 28718. The same has been given proper credit.

"We wish to advise, Mr. Higgins, inasmuch as our records must show a premium paid in full in some manner we are inclosing herewith a note for the balance of the premium payable March 18, 1930, and when the same with your signature is received we will issue premium receipt.

"Thanking you for your remittance and with kind wishes, we remain,

"Very truly yours,
"The Old Line Insurance Company,
"By E. McCormick,
"Ass't Cashier."

The note referred to was nonnegotiable and provided for forfeiture of the policy if not paid when due, in which case the note was canceled and ceased to be an obligation of the insured. The insured did not sign and return this note immediately, but on March 15 the company wrote to him again about the matter. It retained the $10 and made no other statement regarding the payment or the purpose of the note. Upon March 24, or 8 days after the maturity of the note, the insured changed the due date from March 18 to April 18 and returned it to the company. It was accepted and retained by the company.

On April 18 the insured remitted $10, which was applied on the indebtedness. No new extension agreement was executed, but a letter states that the time for payment of the balance was extended 30 days. At this time a line was drawn through the due date (4-18-30) of the note and extension agreement and 5-18-30 written in pencil thereon. The policy had no loan or cash surrender value, but upon the payment of the balance of $8.72 it would have had such a value of $44. On May 21 the company notified the insured that the policy had lapsed for having failed to pay the note. The insured died June 23.

If the semiannual premium due February 2, under the terms of the policy, had not been paid within 31 days thereafter, the policy, according to its terms, would have been lapsed. *Novak v. LaFayette Life Ins. Co.*, 106 Neb. 417. However, the insurance company did not see fit to forfeit this policy. The insured sent in a partial payment. It was accepted and retained by the company. Later, after the expiration of the 31 days of grace provided by the contract and the statutes of Nebraska, it sent him for execution a nonnegotiable note with a forfeiture provision in case said

note was not paid when due, so that its records might "show a premium paid in full in some manner." This note was not executed and returned to the company until March 24, or 21 days after the expiration of the grace period. This first remittance, according to the letter quoted above, was "Applied as part payment on the semiannual premium on your policy No. 28718. The same has been given proper credit." This language, together with the action of the company in retaining the premium, is incapable of any meaning except that the remittance was received as a part payment on the premium. In fact, the suggestion that the extension was only for their records was a waiver of the strict forfeiture provision, which was an inducement to sign said note. This was followed by a second remittance of $10, leaving a balance of $8.72 on the semiannual premium. No new extension agreement was executed. According to the strict terms of the extension note signed, the policy might have been lapsed, but the company again accepted a partial payment and did not demand a forfeiture. This letter acknowledges this second remittance:

"April 24, 1930.

"Carl P. Higgins,
"Schuyler, Nebr.
"Dear Mr. Higgins:

"We wish to thank you for your remittance of $10 representing part payment of note and interest on your policy No. 28718. The same has been given proper credit and for your convenience we are today extending the balance for a period of thirty days.

"Very truly yours,
"The Old Line Insurance Company,
"By ————————,
"Ass't Cashier."

At this time the due date was changed on the policy from April 18 to May 18. When the balance of $8.72 was not paid on May 18, the company attempted to forfeit the policy under the provisions of the extension agreement. "Forfeitures are looked upon by the courts with ill favor,

and will be enforced only when the strict letter of the contract requires it; and this rule applies with full force to policies of insurance." *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338; *Haas v. Mutual Life Ins. Co.*, 84 Neb. 682. "A stipulation for the forfeiture of an insurance policy is waived by conduct of the insurer inconsistent with his right or intention to claim such forfeiture." *Jensen v. Palatine Ins. Co.*, 81 Neb. 523. See *Knoebel v. North American Accident Ins. Co.*, 135 Wis. 424. In this case the company waived by its conduct, which was inconsistent with its right to enforce such forfeiture, by accepting and retaining partial payments of the premium. It was a waiver of payments according to the contract. A provision that a policy shall be forfeited if a premium note is not paid on maturity is for the benefit of the company, and may be waived by the insurer. *Phenix Ins. Co. v. Rollins*, 44 Neb. 745. By waiving the provisions as to the time of payment and the retention of the portion of the premium, the company extended the insurance for the *pro rata* period represented by the amount of the payment. This extended the insurance in force until June 8.

The company urges that the insured was not entitled to any grace period after the due date of the semiannual premium, which was February 2. They discuss the language of the contract and contend that, under its terms, that was the due date. Section 44-602, Comp. St. 1929, provides: "No policy * * * shall be issued * * * in this state unless it contains in substance the following provisions: * * * 2. A provision that the insured is entitled to a grace of one month within which the payment of any premium after the first year may be made." Section 44-608, Comp. St. 1929, says: "A policy issued in violation of this article shall be held valid, but shall be construed as provided herein, and when any provision in such a policy is in conflict with any provision hereof, the rights, duties and obligations of the company, policy holder and the beneficiary shall be governed by the provisions of this article." The construction recommended by the company

would be in violation of the statute. The premium, having been accepted in partial payments and the forfeiture provisions waived, was paid until June 8. At that time there was due $8.72, which the statute gave the insured a grace period of a month to pay. The policy was therefore in force on June 23, the date the insured died.

The court does not pass upon the question as to the allowance of a grace period after the due date of an extension note. The judgment of the trial court is

AFFIRMED.

CORA A. ROTHERY, APPELLANT, V. THOMAS H. DOHRSE ET AL., APPELLEES.

FILED JANUARY 8, 1932. No. 28020.

1. Fixtures: TRADE FIXTURES. The term "trade fixture" will include a large boiler, originally purchased and now owned by a tenant, and installed as a necessary part of his equipment to furnish steam for cleaning and pressing in the French Dry Cleaning Works, of Omaha.
2. ———: ———. The fact that said boiler is used to some extent to heat the rooms will not make it a part of the real estate, where its principal use is the furnishing of large amounts of steam for operating the cleaning plant.
3. ———: ———: REMOVAL. The tenant will be allowed to remove said boiler at the termination of his five-year lease, even though a small portion of a brick wall in the rear of the boiler room must be opened and replaced, at the expense of the tenant, to permit the boiler to be taken out.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

Finlayson, Burke & McKie, for appellant.

Rosewater, Mecham, Burton, Hasselquist & Chew, contra.

Heard before ROSE, GOOD, DAY and PAINE, JJ., and LESLIE, District Judge.

PAINE, J.

On September 9, 1925, Thomas H. Dohrse purchased all of the stock of the French Dry Cleaning Works, located in

Omaha, Nebraska, and was given a lease for five years, with option to purchase the building in which said business was conducted. The bill of sale included a boiler, which soon proved defective, and a credit of $300 was made therefor. A new boiler was purchased by the tenant, and used until the termination of the lease, at which time he attempted to remove the boiler he had purchased from the premises. Upon trial to the court, a restraining order, which had been issued upon application of the owners of the fee, was dissolved, and the tenant was given the right to remove the boiler as a trade fixture.

The appellant is the owner of the fee, and erected a new building upon the premises, at a cost of some $12,000, and the lease gave the appellees the option to purchase the building for the sum of $15,000. While the building was being erected, the question of the installation of a large boiler for use in heating the building and in furnishing steam necessary to operate the cleaning plant arose between the parties. As the lease provided for a rental of 1 per cent. a month upon the cost, if a new boiler was installed, under the option to purchase the tenant would pay 1 per cent. a month of its new cost, or a total of 60 per cent. plus 100 per cent. of its cost if he elected to purchase the property at the end of his lease under his option, thereby making him pay 160 per cent. of the cost of the boiler that would have been used for five years; and thereupon the tenant elected to buy the boiler and install the same, and was allowed a credit of $300 for the value of the old boiler. The boiler was set up before the walls were built around it, and a section of such boiler room wall will have to be taken down and replaced, at the expense of the tenant, to remove the boiler. The present value of said boiler is $500.

The sole question to be decided in this case is: Did the boiler in question, together with the pipes attached thereto, become a part of the real estate, and therefore the property of the plaintiff, or did it retain its character as personalty?

We are cited to several Nebraska cases, *Lanphere v. Lowe*, 3 Neb. 131, which held that trade fixtures which can be removed without material injury to the premises might be removed, and a case involving a steam-heating plant, being *President and Directors of Ins. Co. of North America v. Buckstaff*, 3 Neb. (Unof.) 632, which last case is very closely in point. These cases and many others are discussed and considered in the case of *Frost v. Schinkel*, 121 Neb. 784, in which case it was held: "Trade fixtures may be defined as articles annexed to the realty by a tenant for the purpose of carrying on a trade or business, not exclusively agricultural, and are ordinarily removable by him while he is in possession of the freehold, and that such trade fixtures must be taken to pieces or even wrecked to remove them from the premises does not affect the tenant's right of removal, but such removal must never cause substantial damage to the freehold." This holding will control in this case.

In the case at bar, the tenant did not succeed in removing the fixtures before the termination of the lease; but, by an agreement between the litigants and their attorneys in writing, it was stipulated that whatever rights the tenant had for the purpose of removing said boiler would be granted to him after the expiration of the lease, and such fact alone would not bar the recovery of the tenant in the case.

It appears from the record in this case, and the evidence taken, that it was the clearly-expressed intention of the tenant, at the time he purchased and installed the new boiler, that the same would be and remain a trade fixture and one of his business appliances in the cleaning establishment; and this court finds that the tenant had a right to remove the same, and the decision of the district court in dissolving the temporary injunction, and declaring that the boiler was a trade fixture and might be removed by the tenant, is right and is

AFFIRMED.

NORTHWESTERN STATE BANK OF HAY SPRINGS, APPELLEE, V. DE WITT C. HANKS ET AL., APPELLANTS.

FILED JANUARY 8, 1932. No. 28013.

1. **Mortgages: DEED AS SECURITY: TITLE.** Where an instrument, in form a warranty deed, is executed and delivered to the grantee for the purpose of securing an indebtedness owing from the grantor to the grantee, the legal title under such instrument passes to the grantee.
2. ———: ———: ———. Where an instrument, in form a warranty deed, is executed and delivered by the grantor to the grantee for the purpose of securing an indebtedness owing to the grantee by the grantor, equity will regard the grantor as still retaining an interest in the premises, regardless of the form of the instrument.
3. ———: ———: LEASE: RIGHTS OF GRANTOR. Where a warranty deed, absolute upon its face, is executed and delivered by the grantor to the grantee, and simultaneously therewith a lease in writing is executed by the parties in which it is agreed that the grantor in the deed shall have one year in which to repurchase the premises, the only interest retained by the grantor in the premises thus conveyed is the right to pay the debt within the time limited and receive a reconveyance of the title.
4. ———: ———: ———: ———: TIME OF REDEMPTION. Where a warranty deed, absolute upon its face, is executed and delivered by the grantor to the grantee, and simultaneously therewith a lease in writing is executed by the parties in which it is agreed that the grantor in the deed shall have one year in which to repurchase the premises, upon failure of the grantor therein to repurchase the premises as agreed upon, a court of equity may enter a decree in the nature of strict foreclosure, and it has discretionary powers to award the grantor a reasonable time thereafter to make such payment.
5. ———: ———: STRICT FORECLOSURE: TIME OF REDEMPTION. Evidence examined, and *held* that the trial court abused its discretion in limiting the period to thirty days to pay the debt and receive conveyance.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed as modified.*

A. C. Plantz, for appellants.

E. D. Crites and *F. A. Crites, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

CHASE, District Judge.

This is a suit in equity brought by the Northwestern State Bank of Hay Springs against DeWitt C. Hanks and Lydia J. Hanks, husband and wife, to quiet the title to the real estate described in the petition.

The plaintiff relies on an instrument in form of a warranty deed executed and delivered to it by the defendants, dated November 23, 1926. The defendants contend that in the execution of this instrument it was intended by the parties to be mere security for a debt owing from defendants to plaintiff, and is in legal effect a mortgage.

After hearing the evidence, the trial court by its decree found that, in the taking of said deed, it was intended by the parties as security for the indebtedness of the defendants to the plaintiff, together with advancements made by the plaintiff for the defendants in paying other obligations for the defendants. The court also found the amount due from the defendants to the plaintiff in order to redeem, and decreed that the defendants forthwith pay to the plaintiff the sum of $15,554.59, with interest at 10 per cent. per annum, and costs, and decreed further that, if the above payment was not made within thirty days from and after the entry of the decree, the defendants be forever barred and foreclosed of all right, title and interest and all equity of redemption in the premises and that, in case of failure to make such payments within the time limited, a writ of assistance issue to the sheriff of the county for restitution of the premises to the plaintiff.

Both parties filed motions for new trial and both motions were overruled by the court. Whereupon, the defendants prosecuted an appeal from the findings of the trial court to this court, asserting eleven separate assignments of error.

The Northwestern State Bank of Hay Springs will be termed plaintiff herein, and DeWitt C. Hanks and Lydia J. Hanks as defendants.

It appears that there was a forcible entry and detention proceeding brought by plaintiff against defendants prior to commencing this action, which was heard in this court, and is reported as *Northwestern State Bank v. Hanks,* 118 Neb. 442, and by stipulation of parties the testimony in the former case was and is, in the main, the testimony in the instant case. That case was decided upon a question not involved in this proceeding and hence the decision is in no way applicable to the issues involved herein.

The record fairly reflects the following facts: That on and prior to the 23d day of November, 1926, the defendants appeared to be suffering from considerable financial embarrassment and were indebted to the plaintiff and to various other persons; that on said date the defendants executed and delivered to the plaintiff an instrument in form a warranty deed, reciting as a consideration the sum of "One dollar and cancelation of indebtedness;" that simultaneously with the execution of this instrument the parties entered into an agreement, termed a lease, in which the plaintiff, as lessor, agreed to lease the premises to the defendants as lessees. The lease recited the consideration of one dollar and was for a period of one year, to begin on March 1, 1926, and terminating on the last day of February, 1927; that as a further consideration for the leasing of the premises the defendants agreed to pay all taxes levied against the premises for the year 1926. The lease contained a provision giving the defendants an exclusive option to buy and purchase the premises for a sum equal to the total amount of said indebtedness, which the plaintiff had assumed in accepting the warranty deed hereinbefore mentioned. The lease contained the further provision in which the lessor agreed to list the premises for resale with the Hay Springs Commercial Company upon terms to be agreed upon. In the lease the items of indebtedness which the plaintiff assumed for the defendants in the acceptance of the warranty deed, specifically stated, are as follows: Unpaid taxes for the year 1925 and prior years in the sum of $371.60, a certain judgment lien which

the plaintiff had against the defendants in the sum of $834.50, with interest at 10 per cent. per annum; the sum of $874.90, with interest in the sum of $192.25, which the plaintiff claimed against the defendants and which was involved in a suit pending between the parties at the time, an indebtedness growing out of a promissory note secured by a mortgage on the premises at the time in favor of one A. L. Johnson, which was then in foreclosure and had merged into a decree for the sum of $7,385.30, with interest at 10 per cent. from the 14th day of December, 1925.

The defendant DeWitt C. Hanks testified that the agreement between the parties in the execution of these instruments was that the deed was intended as mere security for the indebtedness which he owed the bank and other people and which the bank had paid for him, and that in accepting the deed the cashier of the bank stated to him that it was intended the same as a mortgage; and further that the plaintiff bank would give him the right to sell the land and get more money out of the place if he could; that the bank would buy his paper and hold it for awhile and give him a chance to sell the land and get something out of it. He further testified that when the bank discovered that one Abegg, the mortgagee in the mortgage which the plaintiff assumed, was foreclosing it and about to sell the premises, was when the plaintiff agreed with the defendant that they would take over his land under this arrangement, pay off the Abegg mortgage, and hold the land to secure their indebtedness and give him the option of selling it within a year, that he understood that the instrument was to be nothing more than a mortgage, and that no one representing the bank ever said anything about buying his land.

Lydia J. Hanks testified that the bank, acting through its cashier, only wanted the defendants to give it security for what the defendants owed it, and that the plaintiff bank wanted the deed only as a mortgage.

The witness Horn, who testified on behalf of the defendants and was present when the transaction involved in the

lease was consummated, testified that he heard nothing said about the purchase of the land.

It further appears without dispute that at no time during the course of these proceedings did the plaintiff tender back or deliver over to the defendants any of the defendants' notes or evidence of indebtedness which the plaintiff contends was paid in acceptance of the title under the deed. It further appears that the attorney for the defendants prepared a brokerage contract in which the defendants listed the land for sale and agreed to sell it, by which brokerage contract these defendants were then treated as the owners of the fee simple title to this land.

The witness Denman, who was cashier of the bank at the time the transaction was consummated and personally in charge of the negotiations out of which the deed and lease grow, as a witness for the plaintiff, testifies that the instrument was executed as a warranty deed because the bank wanted to avoid a foreclosure proceeding.

After careful examination of the whole record, we are convinced that a consideration of two propositions will satisfactorily dispose of the entire case: (1) Whether or not the trial court was justified, under the evidence, in finding that the warranty deed was given for the purpose of securing a loan and was in effect a mortgage; and (2) if a mere mortgage, whether or not the trial court was warranted in limiting the right of redemption of the mortgagors to a period of thirty days.

It is a well-settled and almost universally recognized doctrine that equity, in interpreting transactions between individuals and determining their rights, regards the substance and not the form. It is equally well settled that if an instrument executed by parties is intended by them as security for a debt, whatever may be its form, or whatever name the parties choose to give it, it is, in equity, a mortgage. In the case of *Flagg v. Mann*, 2 Sumn. (U. S.) 486, one of the earliest cases on this subject, this doctrine was announced by Judge Story, and it has been adopted, except in a few isolated instances, by every jurisdiction

in this country. The rule grows out of the the broad equitable principle that it regards substance and not form.

"Whenever the intention is to take a security for a subsisting debt, or for money lent and to avoid or restrict the equity of redemption, chancery, seeking to protect the debtor against the rapacity of the creditor, and to do full and equal justice between the parties, will defeat such intention, by treating the transaction as a mortgage." *Dougherty v. McColgan,* 5 Gill. & Johns. (Md.) 281.

"The particular form or words of the conveyance are unimportant; and it may be laid down as a general rule, subject to few exceptions, that whenever a conveyance, assignment, or other instrument, transferring an estate, is originally intended between the parties as a security for money, or for any other incumbrance, whether this intention appear from the same instrument or any other, it is always considered in equity as a mortgage." Story, Equity (3d ed.) sec. 1018.

This court has repeatedly held that, where two instruments are executed simultaneously, in determining the effect and intention of the parties they will be construed together. We are of opinion that the trial court was correct, in view of all the evidence and circumstances of the case, in determining that the instrument upon which the plaintiff seeks to quiet its title was intended as security for a debt, and that the grantors still retained equitable rights in the subject-matter thereof. If the decree of the court is correct as to this proposition, and we think it is, then the further question to be determined is whether or not the period of thirty days fixed by the decree for the debtor to redeem or to pay the debt and demand a reconveyance was unwarranted and inequitable under the circumstances.

The effect of a strict foreclosure is to terminate all the interest of the mortgagor upon his failure to comply with his contract, and usually where the doctrine is applied the courts are clothed with discretionary power to allow the debtor a reasonable time to pay the debt and thus redeem

his property. This court has permitted the application of the doctrine of strict foreclosure in numerous cases. *Gallagher v. Giddings*, 33 Neb. 222; *Patterson v. Mikkelson*, 86 Neb. 512; *Foster v. Ley*, 32 Neb. 404. This court has held many times that, where a deed absolute upon its face has been executed and delivered and was intended as a mortgage, notwithstanding such an intention, the legal title to the premises is vested in the grantee, and the only right the grantor can have under such circumstances is to pay the amount due and thus receive a reconveyance thereof. *Stall v. Jones*, 47 Neb. 706; *Zittle v. Schlesinger*, 46 Neb. 844; *First Nat. Bank of Plattsmouth v. Tighe*, 49 Neb. 299; *First Nat. Bank of David City v. Speltz*, 94 Neb. 387.

It might be argued that this court in its earlier decisions has been somewhat inaccurate in its phraseology in discussing this subject. To hold that an instrument intended as security for a debt is a mortgage, and to hold further that the title to the mortgaged premises is in the grantee, seems to be slightly inconsistent in view of this court's definition of a mortgage.

"A mortgage is a mere pledge, or collateral security, creating a lien upon the mortgaged property, by conveying no title or vesting no estate either before or after condition broken." *Kyger v. Ryley*, 2 Neb. 20.

This doctrine has been reaffirmed in *Clark v. Missouri, Kansas & Texas Trust Co.*, 59 Neb. 53; *Orr v. Broad*, 52 Neb. 490, and in numerous other cases. A mortgage has been held by this court as a mere lien upon real estate for the purpose of securing an indebtedness, with the legal title retained by the mortgagor; and the equitable interest of the mortgagee is personal property only. The method of divesting the mortgagor of his title is by foreclosure and sale of the premises.

In a case where the instrument appears on its face to be an absolute conveyance, or warranty deed, and where the title has passed to the grantee, as this court has held it does, even although the parties intended it as security for a debt, we think under the holdings of this court the

grantor has conveyed to the grantee all the interest that he has in the premises, and retains only, by operation of equity, the right to pay the indebtedness to the grantee and receive a reconveyance of the title. If, under these circumstances, the instrument amounts to a mortgage, as the courts have said it does, then the procedure would be foreclosure and sale in order to divest the mortgagor of his interest in the premises. A sale, under such circumstances, could not be decreed for the purpose of divesting the mortgagor of his legal title, because he has already voluntarily divested himself of it by his deed of conveyance. It would not be strict logic to say that in case of a foreclosure and sale, and there were no bidders at the sale, the grantee would be required to purchase land of which he is already the owner, in order to protect his rights. The grantor's interest, under such circumstances, is a mere right to tender the amount of money the grantee has paid for the grantor, at the contract rate of interest, and receive a reconveyance of his title. Those cases which we have examined in which a sale of the premises was had are based upon foreclosure of a mortgage containing a defeasance clause, and not such an instrument as under consideration here. Where the mortgagor avails himself of the right of redemption under a mortgage with the defeasance clause, the only thing required of him to do is to pay the debt. In the event the grantor under the circumstances involved in this case desires to protect himself, he is required to do two things: Pay the debt, and obtain a reconveyance of his title, which, if refused, he could enforce in a court of equity. Applying the doctrines already announced by this court and treating the title as already vested in the grantee, it seems to us that the trial court could have logically rendered no other decree than one in the nature of strict foreclosure.

In the case of *Patterson v. Mikkelson,* 86 Neb. 512, the rule seems to be that courts of equity allow a decree of strict foreclosure in cases where it would be inequitable to do otherwise. The right of the court so to decree seems

to repose in its sound discretion. We find no abuse of discretion on the part of the trial court in rendering that part of the decree which is in the nature of a strict foreclosure.

The only remaining question left for us to consider is whether or not the trial court abused that discretion in limiting the period of the defendants' right to reconveyance of the premises to thirty days.

Courts of equity, in cases where it can be done without doing violence to an established principle of law, should afford debtors any reasonable opportunity to make good their engagements and thus avoid forfeiture of the title to their property. Under the circumstances, we conclude that the court abused its discretion in limiting this period to thirty days. We take the view that the time given the defendants to make payment of the indebtedness and secure a reconveyance of the premises should, under the circumstances, and in consideration of the rights of all parties, be reasonable; that nine months, the ordinary period of a stay of execution, is not unreasonable, and such time is hereby extended to nine months from the time the mandate of this court issues.

With these modifications, the decree is affirmed.

AFFIRMED AS MODIFIED.

ANNA ELLIG, APPELLEE, V. THOMAS POWELL, APPELLANT.

FILED JANUARY 8, 1932. No. 28017.

1. Evidence examined and found generally sufficient to support the verdict.
2. Rape: ACTION FOR DAMAGES: RESISTANCE: QUESTION FOR JURY. In a civil action to recover damages, based upon facts sufficient to constitute the crime of rape, the question of whether or not the plaintiff resisted the advances of the defendant to the extent of her physical ability is for the jury to determine.
3. ———: ———: PROOF. In a civil action to recover damages based upon facts constituting forcible ravishment of a female, no corroboration of the female's testimony is necessary; a mere preponderance of the evidence is sufficient to support a verdict.

4. ———: ———: DAMAGES. The verdict of $1,250 *held* not to be excessive.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Bartos, Bartos & Placek, for appellant.

John E. Lowe, contra.

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

CHASE, District Judge.

This is a civil action brought by Anna Ellig as plaintiff, against Thomas Powell, as defendant, to recover damages for an alleged assault and battery.

The facts upon which she relies for recovery, if it were a criminal prosecution, would amount to the crime of rape. The case was tried to a jury, resulting in a verdict of $1,250 for the plaintiff, whereupon the defendant filed a motion for a new trial, which was overruled by the trial court, and judgment on the verdict rendered. From the action of the trial court in overruling the motion for a new trial and entering judgment on the verdict, the defendant has appealed to this court. For the purpose of convenience the parties will be termed plaintiff and defendant as they were in the court below.

Several grounds for reversal are urged by the defendant. One is that the judgment is not supported by the evidence. It would serve no good purpose to detail at length this salacious story. We have carefully read the record, unsavory as it is, and reach the conclusion that from all the facts and circumstances disclosed thereby the evidence is amply sufficient to support the verdict as to this complaint of the defendant.

Another assignment of error is that the proof of resistance on the part of the plaintiff, required in cases of this character, was not sufficient to support a recovery.

The plaintiff testifies that on and prior to this episode she was living on a farm with her parents in Johnson coun-

ty; that she and the defendant, together with another young couple, had been attending a charivari at a place some miles distant from her home; that these four persons rode in a Ford coupé, the other couple in the front seat, and plaintiff and defendant in the rumble seat; that on the night in question, on their return to a point near the plaintiff's home, they passed an orchard, and some one of the party suggested that they get out of the automobile in which they were riding and go into the orchard in search of apples. This they did, the plaintiff and defendant, after entering the orchard, going in one direction and the other couple in another; that while the plaintiff and defendant were in the orchard, in the absence of the other couple, the plaintiff testifies that the defendant purposely tripped her, causing her to fall upon the ground, and while in that position he forcibly ravished her. The plaintiff detailed numerous acts in attempt to prevent the assault, from which the jury could rightly conclude that she resisted the aggression of the defendant.

The defendant, in his testimony, denied ever having been at the orchard at all on that occasion, and also denied that he committed any assault upon the plaintiff whatever. The other two persons in company with them both testify that they never stopped at the orchard, as detailed by the plaintiff.

The defendant in his brief contends that the record does not disclose any resistance sufficient on the part of the plaintiff to justify a recovery. It must be remembered that this is a civil action as distinguished from a criminal prosecution. Defendant cites *Kramer v. Weigand*, 91 Neb. 47, in support of his contention. A careful reading of this case convinces us that it completely disposes of defendant's contention against him. The question of whether or not the plaintiff resisted to the extent of her physical ability was a question for the jury to determine, and the jury, having had all the evidence before them, in finding for the plaintiff, must have reached the conclusion that the plaintiff resisted the defendant to the extent of her physical

ability. The decision of the jury upon questions of fact of this character is final, when submitted under appropriate instructions, and we find no complaint as to the instructions given by the trial court.

In the case above mentioned, which was a case of forcible ravishment, the same as the one at bar, the court made use of the following language:

"It is well-settled law that the weight of evidence showing a failure to make an outcry or to complain of an assault are questions for the jury in a civil action."

As to this contention we hold that the question of whether or not the plaintiff resisted the embraces of the defendant to the extent of her physical ability was a question to be determined by the jury, whose finding will not be disturbed unless it appears that the conclusion reached is manifestly wrong.

The defendant assails the verdict for the further reason that it is based on the uncorroborated testimony of the plaintiff. It has been held on numerous occasions, by this court and others, that in civil actions a mere preponderance of the evidence is sufficient upon which to base a finding. The court submitted the issues upon this question to the jury under instructions not questioned by the defendant, and the jury, by their verdict, found that the evidence preponderated in favor of the plaintiff. We find no cases cited and we have discovered no rule of evidence harsh enough to require a female, before she can recover damages in a civil action against one who, if prosecuted criminally, would be a rapist, to produce a witness either to the overt act or to a circumstance so closely connected therewith as would amount to corroboration. An act such as the one complained of, from the very instincts of human nature, is not likely to be committed in the presence of witnesses, or under such circumstances that corroborating evidence could ordinarily be obtained to support the truth of the plaintiff's claim.

The defendant further argues that the verdict is excessive and the amount thereof should be reduced by this

court. It appears that the plaintiff was a young woman, 24 years of age, very little accustomed to the ways of the world, as her parents had guarded her conduct quite closely up to this particular occasion, chaste for aught the record discloses to the contrary. The jury found that she was forcibly ravished, her chastity violated, and ruthlessly maltreated by the defendant without her consent and against her will. It was her right, as a matter of law, to go through life with her purity undefiled, and be secure from any forcible invasion of her person by another. To have such rights wantonly trespassed upon ought not to be regarded as a trivial matter.

In view of all the facts shown by the record, we are unable to agree with counsel that the judgment is excessive. The judgment therefore is

AFFIRMED.

IN RE ESTATE OF JANE BROWN. WILLIAM B. BROWN ET AL., APPELLANTS, V. LAURA MAE KENDALL MURRAY, APPELLEE.

FILED JANUARY 13, 1932. No. 28046.

Wills: PROBATE: SUFFICIENCY OF EVIDENCE. Evidence examined and *held* to sustain finding that the proposed written instrument is the will of Jane Brown, deceased.

APPEAL from the district court for Adams county: J. W. JAMES, JUDGE. *Affirmed.*

Stiner & Boslaugh and *Edmund P. Nuss,* for appellants.

William M. Whelan, contra.

Heard before ROSE, GOOD and DAY, JJ., and FROST and MESSMORE, District Judges.

PER CURIAM.

From a judgment determining that a proposed written instrument is the will of Jane Brown, deceased, and that it should be proved and allowed as her will, contestants have appealed.

One of the objections to the probate of the will is that the instrument was not executed in the manner prescribed by statute. The assignments of error on this appeal relate only to the sufficiency of the evidence to prove the due execution of the will.

For many years Mrs. Brown had been a resident of Adams county, Nebraska. In November, 1918, she accompanied her brother, Ben Prideaux, to California to spend the winter. On April 24, 1919, just preceding return to her Nebraska home, Mrs. Brown and her brother went to the office of J. B. Johnson, a real estate dealer, in Pasadena, California, where Mr. Johnson prepared the instrument in controversy. It was signed by Mrs. Brown as her will in the presence of her brother and Mr. Johnson. The two latter, at her request, signed the instrument as attesting witnesses. Mr. Prideaux, the brother, died a year later.

On the trial of the issues in this case competent witnesses, familiar with the signatures of Mrs. Brown, the testatrix, and of Mr. Prideaux, one of the witnesses to the instrument, testified that the signatures were the genuine signatures of the testatrix and of Mr. Prideaux. The evidence of the only surviving attesting witness, Mr. Johnson, was taken by deposition in California. On his examination, a written instrument was presented to him, which he identified, and testified that he had prepared for Mrs. Brown as her will; that she signed it as such in the presence of Mr. Prideaux and himself, and that he and Mr. Prideaux, at her request, signed the instrument in her presence as attesting witnesses. Neither the instrument nor a copy thereof was made a part of Mr. Johnson's deposition. Contestants argue that there is no competent evidence that the written instrument, about which the witness Johnson testified, is the one presented for probate. Counsel, who represented contestants in the trial court, was present at the taking of Mr. Johnson's deposition, and cross-examined him with reference to several provisions in the will, and referred to the provisions by the numbered paragraphs where they appeared in the will. The provisions referred to in

the cross-examination are identical with those in the will received in evidence on the trial. Moreover, the instrument in controversy is written on the back of a letterhead of Mr. Johnson, and that circumstance was referred to in his cross-examination. There is no evidence that Mr. Johnson ever prepared for Mrs. Brown any other will or any other written instrument. Doubtless, had there been any question as to the identity of the instrument, examined and testified to by the witness Johnson, with that offered for probate on the trial, counsel for contestants would have disclosed that fact and offered testimony with reference thereto.

We are of the opinion that the evidence is not only sufficient to sustain a finding that the written instrument offered is the one concerning which the witness Johnson testified, but that the evidence is such as to compel that finding. The evidence would have warranted no other finding.

The record is free from error. Judgment

AFFIRMED.

FRANK G. JACKSON, APPELLANT, V. ARNDT-SNYDER MOTOR COMPANY, APPELLEE.

FILED JANUARY 13, 1932. No. 28044.

Replevin: MEASURE OF DAMAGES. In a replevin action where the ownership of a truck is concededly in the plaintiff and the defendant's right of possession therein is created by virtue of a lien for truck repairs, the value of the right of possession and not the value of the truck is the measure of damages. *Held*, that the court erred in finding that the defendant is entitled to a return of the truck within three days, or the value thereof, instead of the value of the defendant's possession.

APPEAL from the district court for Washington county: CHARLES E. FOSTER, JUDGE. *Reversed.*

Grant Lothrop, for appellant.

O'Hanlon & O'Hanlon, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and WRIGHT, District Judge.

DEAN, J.

Under a writ of replevin issued by the county court of Washington county, Frank G. Jackson, a minor of 19 years, by his next friend, Jay L. Jackson, recovered possession of a Chevrolet truck from the defendant, the Arndt-Snyder Motor Company. In its answer the defendant company admitted plaintiff's ownership of the truck, but contended that the truck was delivered by the plaintiff to the company for the purpose of having certain repairs made thereon, and that, under the provisions of section 52-201, Comp. St. 1929, the truck was being retained until the charges thereon were paid. Section 52-201, *inter alia*, so far as applicable provides that any person who makes repairs on an automobile shall have a lien thereon while the automobile is in his possession "for his reasonable or agreed charges for the work done or material furnished, and shall have the right to retain said property until said charges are paid."

The plaintiff in his reply alleged that when the truck was purchased from the defendant it was warranted to be free from defects, but that the material and workmanship thereon were later found to be defective. It is also alleged that the defendant therefore agreed to make the necessary repairs on the truck in consideration of the payment, by the plaintiff, of the remainder then due on the purchase price of the truck. The county court entered a judgment in favor of the defendant, and ordered that the truck be returned within three days or that, failing to so do, the plaintiff pay the defendant $275 as the value thereof, $85 as damages for wrongful detention, and costs of suit. The judgment was affirmed by the district court. Plaintiff has appealed.

We have not been favored with a brief by the defendant, but the record appears to disclose that the judgment is for reversal. As hereinbefore noted, the judgment provides that the defendant shall recover the "value" of the truck

as well as damages for its wrongful detention. On this feature the trial court decreed that the right of possession was in the defendant, but no finding was made in respect of the value of such possession.

Section 20-10,103, Comp. St. 1929, provides that, in a like case, it shall be determined "whether the defendant had the right of property or the right of possession only." And in section 20-10,104, Comp. St. 1929, it is provided that, if the judgment is for the right of possession only, such judgment shall be for the value of such possession in case a return of the property cannot be had, damages for withholding such property, and costs.

Under the pleadings it is admitted that the ownership of the truck was in the plaintiff, and therefore the value of the defendant's right of possession became the measure of damages, and not the value of the truck. And since ownership in the plaintiff is conceded and the defendant's right of possession is created by virtue of a lien for repairs on the truck, it appears to us that the court erred in finding that the defendant is entitled to a return of the truck or the value thereof instead of the value of his possession. *Brownell v. Fuller*, 57 Neb. 368; *Tyson v. Bryan*, 84 Neb. 202; *Welton v. Baltezore*, 17 Neb. 399. "Where the defendant in an action of replevin claims a special interest only in the property in controversy by virtue of a mortgage or other lien, his measure of damage, in case the property cannot be returned, is the amount of his lien with interest and costs, within the value of the property." *Creighton v. Haythorn*, 49 Neb. 526. And in an earlier case we held: "In an action of replevin where the verdict is in favor of the defendant, whose ownership is special by reason of a chattel mortgage or other lien, the measure of his damages in case a return cannot be had is the amount due him upon his lien, if within the value of the property as found by the jury. But such damages should in no case exceed the value of the property." *Cruts v. Wray*, 19 Neb. 581. And the rule in this jurisdiction has long prevailed that, "In an action of replevin, where the property has been delivered

to the plaintiff, in case a verdict is returned in favor of the defendant, the judgment must be in the alternative for a return of the property, or the value thereof, in case a return cannot be had, or the value of the possession of the same, and for damages for the unlawful detention. The statute requiring the judgment to be in the alternative form is imperative." *Manker v. Sine,* 35 Neb. 746. See *Field v. Lumbard,* 53 Neb. 397; *Goodwin v. Potter,* 40 Neb. 553.

The judgment is reversed and the cause remanded for further proceedings consistent with the views expressed herein.

REVERSED.

BANKING HOUSE OF F. FOLDA, APPELLANT, V. J. M. HIGGINS, APPELLEE.

FILED JANUARY 13, 1932. No. 27946.

Witnesses: COMPETENCY. When an interested witness has testified to a conversation between deceased and his wife, and objection is made that it violates section 20-1202, Comp. St. 1929, if thereafter letters are introduced by the representative of the deceased in reference to the transaction with the deceased, and its pleadings are amended by inserting statements therefrom, any errors in the rulings of the court are thereby cured.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

J. A. Donohoe, for appellant.

J. J. Harrington, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and REDICK, District Judge.

PAINE, J.

This is an action upon a promissory note of $575, which was tried to a jury. There was a very sharp conflict in the evidence, and finally a verdict was returned in favor of the defendant and signed by ten of the jurors.

Plaintiff and appellant, a state banking corporation, of Schuyler, Colfax county, brought suit against the defend-

ant and appellee in Holt county, Nebraska, upon a promissory note reading as follows:

"Schuyler, Nebraska, Nov. 18, 1926. $575.00

"Ten days after date, for value received, I, we, or either of us, promise to pay to the order of W. J. Higgins Five Hundred and Seventy Five Dollars. Payable at Schuyler, Nebraska, with interest at the rate of 10 per cent. per annum, payable annually from date until due, and ten per cent. after maturity until paid. The makers, sureties and indorsers of this note hereby waive presentment for payment, notice of nonpayment, protest and notice of protest of this note and each of us hereby charge our own separate estate for the payment of this note.

"For Hay Dumas, Nebr. J. M. Higgins."

Said note being indorsed on the back with the words, "Wm. J. Higgins." The original of said note appears on page 65 of the bill of exceptions. The words "For Hay" appear to be in the same handwriting as the body of the note, but not in the same handwriting as the signature of the maker of the note. The words "Dumas, Nebr.," are in lead pencil, and appear to be in another handwriting.

The appellee filed his answer, admitting the execution and delivery of the promissory note, and admitting that he had paid nothing upon said note. And, as a defense, the appellee alleges that there was no consideration given for the note; that the circumstances under which it was given were these: That, on the date of the note, the payee, W. J. Higgins, a distant cousin, came to the ranch home of the appellee, stated that he was hard up and needed $575 for a week or ten days, and that if the appellee would give him an accommodation note for that amount he would never have to pay the note or any part thereof, and that payee would guarantee to return the note within a short time; that, relying upon such statements and representations, appellee executed and delivered the note sued upon. Appellee alleges that, some time after the note was past due, he saw the note in the possession of W. J. Higgins, to whom it was given, and that at that time it had not been indorsed

by him to the appellant or any one else, and that the appellant is not an innocent purchaser for value before maturity in due course of business, and that there is nothing due to the appellant upon said note. The note was given on November 18, 1926, and the payee of the note came back to the ranch in Garfield county in January, 1927, bringing the note with him, for the purpose of getting some security on the note. The reply was a general denial. Appellant conceded at the opening of the trial that the burden of proof was upon the appellee, who was given the opening and closing.

Upon a question by the court, the appellee made answer as follows: "Golly, there isn't much to say besides what has been said; he told my wife if I would give him collateral on his note, a few things that was not already mortgaged to Mr. Folda, my horses, harness, saddle and a few hogs, if I would give him collateral on this note that he could realize some money on it; he could take it back to the bank and borrow on it, and that say in the course of ten days or two weeks, or such a matter, he would return the note; that I would be helping him that much. Which I generally refused to do." The Court: "That last remark, which I generally refused to do, may be stricken out and the jury will disregard it."

Hildred Higgins, the wife of the appellee, testified that she was at the ranch house, which was in Garfield county, Nebraska, in January of 1927, and related the conversation between herself and the payee, and that there was no consideration whatever given for the note originally, but it was just an accommodation that the payee might borrow money on, and to be returned in a very short time.

J. Folda, of the appellant bank, testified that the note sued upon was one of several notes turned over to the bank on April 13, 1927, as additional collateral security for an older note, which was then renewed, in the sum of $8,363.54, given by W. J. Higgins, and that the bank advanced an additional sum of $400 by reason of securing the note in suit as additional security.

The appellant's counsel presents as a ground for reversal that the court, over his objections, allowed the appellee to testify to a conversation with the deceased payee of the note, W. J. Higgins. Section 20-1202, Comp. St. 1929, in regard to conversations with deceased persons, forbids evidence of conversations between the deceased person and the interested witness. The appellee first seeks to avoid the force of the statute by giving the conversation that occurred between his wife and the deceased, W. J. Higgins. We have quoted in this opinion an important answer made in such testimony, from which it appears that the wife actually took a leading part in finding out why W. J. Higgins wished to get the note signed by her husband, and the reading of her testimony shows that she was very much interested in her husband's signing this note, and the reasons for it.

It has been held by this court that, where the transaction was not between the witness and the deceased person, but between the latter and a third party, in which the witness took no part, then it is admissible. *Kroh v. Heins*, 48 Neb. 691. In *DeWulf v. DeWulf*, 104 Neb. 105, two young girls, who heard a conversation between the deceased and their mother, were allowed to testify to it, as they took no part in the conversation. See *Hajek v. Hajek*, 108 Neb. 503. The appellee, however, went into the very same transaction, and introduced letters to prove that, instead of the note being an accommodation note, without consideration, it was given in payment for hay. And, further, near the close of appellant's evidence, the court allowed it to amend its petition by striking out paragraph 3, reading as follows: "That in the due course of business, and for a good and valuable consideration to him in hand paid by the plaintiff, Banking House of F. Folda, the said W. J. Higgins duly assigned, indorsed, transferred and delivered said note to the plaintiff herein by the name of Wm. J. Higgins and that the plaintiff is now the owner and holder thereof," and inserting therefor a longer paragraph, in which he set out statement from the correspondence between appel-

lant and appellee's attorney, M. F. Harrington, reading: "Now he has given a note * * * to W. J. Higgins for a certain interest in hay," and many others in reference thereto. And these facts, we think, bring the case clearly within the holding in *Warnick v. Warnick,* 107 Neb. 747, in which this court held: "Where a witness, having a legal interest in the result of an action, and therefore incompetent under section 7894, Rev. St. 1913, testifies to a conversation or transaction with a deceased person, and the adverse party, the representative of such deceased person, thereafter introduced in evidence documents relating to the same transaction, concerning which such witness testified, *held,* that, although the testimony of said witness may have been incompetent when received, it was made competent through the action of the representative of the deceased in introducing such documentary evidence." And in *Cline v. Dexter,* 72 Neb. 619, it was held that, after letters were introduced on behalf of the deceased, it was error to exclude testimony in reference to the transaction by the adverse party. We do not find reversible error in the exclusion of certain letters and other rulings made by the trial court.

Instruction No. 4, given by the court, reads as follows: "Gentlemen, under the law and the evidence there is for your determination only the question of whether or not the note in suit was given for hay, or as an accommodation note. You will return a verdict for the plaintiff for $805 unless the defendant has proved by a preponderance of the evidence that the note sued upon was given without consideration and as an accommodation."

While this court might not have arrived at the same conclusion that ten members of the jury did, because of the statements in M. F. Harrington's letter, whether the same were authorized or not, yet the trial court limited the case to the determination of a single question of fact, and we will not disturb the finding of the jury thereon. The judgment of the lower court is hereby

AFFIRMED.

MARY E. MAST, APPELLEE, V. ADA MURRAY ET AL., APPELLANTS.

FILED JANUARY 13, 1932. NO. 28103.

1. **Deeds**: CANCELATION: FRAUD. Where the evidence shows, as in this case, that a deed of a valuable interest in real estate was made by an aged woman of limited education and no business experience, without consideration, and there is evidence she did not know the instrument signed was a deed, but was led to believe and did believe it was a lease of her life estate therein, *held*, sufficient to establish fraud, and equity will cancel such deed.
2. ———: ———: RENT. On the cross-appeal of appellee, *held*, that by reason of the contract set out in the opinion appellee is not entitled to recover rents prior to March 1, 1929.
3. ———: ———: ———. That part of the decree providing for interest on the annual rental beginning on March 1, 1929, modified, and interest allowed on the annual rental from March 1, 1930, when the rent for the year 1929 became due.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Affirmed as modified.*

A. L. Tidd, for appellants.

J. A. Capwell, D. O. Dwyer, W. L. Dwyer and *W. A. Robertson, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and LOVEL S. HASTINGS, District Judges.

HASTINGS, District Judge.

This is an action in equity brought by the appellee, Mary E. Mast, against the appellants, Ada Murray and her husband, Edward Murray, for the cancelation of a certain quitclaim deed executed by the appellee, Mary E. Mast, to the appellant, Ada Murray, and for an accounting for rents. Fraud and want of consideration were alleged as grounds for the cancelation of said deed. Appellants, by their answer, denied fraud, and alleged consideration. The trial court found for the appellee, canceled the deed, found that appellee was entitled to an accounting for the rents of the real estate involved, for the years 1929, 1930, and

1931; found the reasonable rental value of such lands per year to be $2,000, and, after deducting the credits which appellants were found entitled to, that there was due and owing to appellee from the appellants the sum of $4,945.47. From said judgment the appellants, defendants in the court below, have appealed.

The appellee prosecutes a cross-appeal claiming that she should have been allowed rents and profits for the years 1926, 1927, and 1928. The questions presented for consideration on the appeal and cross-appeal are: (1) Was the deed from Mary E. Mast, appellee, to Ada Murray, appellant, obtained by fraud and deceit? (2) Was said deed without consideration? (3) Was the appellee entitled to rents and profits for the years 1926, 1927, and 1928?

It appears from the record that appellee is the mother of the appellant, Ada Murray. The appellee, at the time of the execution of the deed in question, had a life estate in 280 acres of farm land in Cass county, Nebraska. That is the interest it is claimed appellee conveyed by the quit-claim deed in question to the appellant, Ada Murray. Appellee's life estate in said lands was devised to her by the last will and testament of her husband, Abraham Mast, deceased. When his will was offered for probate a contest was threatened by some of his heirs. To avoid a contest, a contract was entered into on March 11, 1916, by the appellee and the heirs at law of the testator, in which they all agreed to permit the will to be probated, and further agreed that appellee should take the life estate as provided in said will and waive her right to elect to take under the statutes of Nebraska; that on the death of appellee there should be paid to the appellant, Ada Murray, and Arnold Mast, her brother, such sum as would be necessary to make the said Ada Murray and Arnold Mast equal to all the other heirs for advancements and payments made to them by Abraham Mast during his lifetime, and that the remainder of the estate, real and personal, should be divided equally among the children of Abraham Mast, deceased, and that the children of his deceased daughters, Nettie

Pierson and Mary C. Dill, should take the share of their mothers. Under this agreement the children of Abraham Mast, then living, took a one-seventh interest in his estate and the children of each of his two deceased daughters took her one-seventh interest. Under this agreement the will was probated, and a decree entered assigning shares as provided therein.

The appellants rented from the appellee, for the year 1921, about 145 acres of the land in which she had a life estate; they moved on said land and gradually increased their leased acreage each year until in 1924, when they occupied the entire farm as tenants, except the house and a small piece of ground surrounding the same, where appellee lived with her son, Arnold Mast. During that time they had the land rented for two-fifths of the grain raised thereon and $5 an acre for the pasture land. They sold the crops raised on the land, paid the taxes, and paid appellee, in small amounts as she needed the same, what they claim was the balance due her for rent. Appellants were thus occupying the land as tenants in the year 1925 at the time the deed in question was made.

The quitclaim deed was made on the 18th day of November, 1925, and the consideration named therein is $500. The evidence upon the question of fraud and the consideration for the making of the deed is conflicting. Only a brief summary of the evidence upon this question will be attempted.

The evidence in behalf of the appellee shows, at the time the deed was signed, she was about 70 years old, had very little education and no business experience; that on the day the deed was signed appellants took her to Plattsmouth in their automobile and she and her daughter went shopping, and on her return to their car she heard her daughter say to her husband, "Is it all right?" and he said, "Yes." And she said, "Well, we will go over there," and then she said to appellee, "We will go over to the office." Appellee says she did not know where she was going, but that they took her over to Judge Beeson's office, and that, after writ-

ing awhile on the typewriter, he inquired what the consideration was, and that she did not know what he meant, and her daughter said "$500." When he finished writing, her daughter said to her, "Ma, sign that now," and she said she would "fix things up and take care of things." The evidence further shows that at the time of the signing of the deed the appellant, Ada Murray, said something about paying rent, and when she said $500 appellee believed that she would "get the rent." It further appears that appellee did not understand that she was signing a deed of her life interest, but believed the same to be a lease; that she did not have her glasses with her at the time that she signed the deed and could not see very well, everything "looked black to her." Her signature, as it appears upon the deed, indicates the truth of her statement, that she could not see very well at the time. It further appears, from appellee's evidence, that prior to the time of the signing of the deed in 1925 several persons solicited her to lease her land, that she imparted this information to her daughter, and that her daughter told her that she wanted her to sign it over to her. The appellee denies that she ever received the $500 named as consideration in said deed or any part of it. In this she is corroborated by the testimony of W. A. Robertson, an attorney whom she employed to get the appellants to reconvey her life estate to her. Mr. Robertson's testimony is to the effect that he demanded of Mrs. Murray that she reconvey her mother's life interest to her, and that Mrs. Murray stated, at that time, that she had never paid anything for it and that she would deed it back if a guardian was appointed for her mother so that Arnold Mast could not get the rent. She is also corroborated to some extent by the testimony of Judge Beeson, who testified that at the time the deed was executed he had no recollection of any money being paid to the appellee.

The evidence on the part of the appellants is that they went to the office of Judge Beeson at the request of appellee and it was at her solicitation that the deed was made; that as a consideration therefor they were to pay her $500;

that she was to be protected on a note that she had signed with her son, Arnold Mast, for $2,000, payable to the Farmers State Bank of Plattsmouth, and appellants agreed to furnish her support during her life. Appellants testified that on the day the deed was made the daughter paid appellee $100 in cash, as a part of the $500 consideration named in the deed, and that about 90 days thereafter, at their home, they paid her the balance of $400 in cash; they requested no receipts for these alleged payments and received none. A reading of their testimony upon the question of these payments is not convincing as to its truth. The appellant, Edward Murray, testified that he paid the $2,000 note of Arnold Mast on which appellee was surety to protect her, and that formed a part of the consideration for the giving of the deed. In regard to that transaction, the evidence shows that on April 23, 1926, the president of the Farmers State Bank of Plattsmouth called at the home of appellee and her son, Arnold Mast, and demanded of them payment of the $2,000 note, which appellee had signed as surety; that after some talk the appellant, Edward Murray, was called in, and it was agreed between him and Arnold Mast that he would purchase Arnold's one-seventh interest in the land and pay his indebtedness to the Farmers State Bank of Plattsmouth, amounting to a little over $3,000, and also the $2,000 owed by Arnold Mast to the Nehawka Bank. That afternoon they went to the Nehawka Bank and Edward Murray gave the president of the Farmers State Bank of Plattsmouth a check payable to that bank for $2,200 drawn on the Murray State Bank, and the president of the Farmers State Bank thereafter gave the Nehawka Bank his check for the amount due that bank. Afterwards Arnold Mast executed a note for $3,000 and a mortgage on his undivided one-seventh interest in the land to the Farmers State Bank of Plattsmouth to take up the indebtedness that they held against him, a part of which was the $2,000 note signed by appellee. After so doing he executed a deed to the appellant, Edward Murray, for his said one-seventh interest in said land, in which the grantee assumed the payment of said $3,000 mortgage.

It appears that at the time the appellant, Edward Murray, purchased the one-seventh interest of Arnold Mast, the $2,000 note on which appellee was surety was secured by a mortgage given by Arnold Mast on his said interest to the Farmers State Bank, and that such mortgage was ample security therefor and so considered by the cashier of said bank. No reason existed for appellee to request appellants to protect her from having to pay said note. The payment of the $2,000 note, on which appellee was surety, by the appellant, Edward Murray, assuming the mortgage for $3,000 on the land as part of the purchase price, did not operate as any consideration for the conveyance of appellee's life estate. The one-seventh interest that he purchased is shown by the evidence to have been of the reasonable value of at least $175 an acre, and the amount that he paid therefor was much less than such value.

The appellee denies in her testimony that there was ever any arrangement whereby she was to give the deed in consideration of her support during life and relieve her from the payment of the $2,000 note on which she was surety; and it is somewhat significant that, if the agreement was such as appellants claim, when it was asked in Judge Beeson's office at the time the deed was made, what the consideration was, the daughter did not state, in addition to $500, it was for the support of her mother during her life and to relieve her on her liability on the $2.000 note.

The evidence on behalf of the appellee further shows that, after the execution of the deed, appellants remained on the premises under practically the same conditions as they had before, that they paid the taxes as they became due upon the land, gave her small sums of money as they had before, furnished her some groceries and some little clothing. After making the deed there was nothing in the relations of these parties which would indicate that any change in relationship was affected or to challenge appellee's attention to the fact that appellants were claiming to occupy the premises otherwise than as her tenants, until in August, 1929.

It appears that during the month of January or February, 1929, appellee suffered an injury, and that she was taken to the home of the appellants, where she remained until the latter part of August of that year. A day or two before appellee left the home of her daughter, her daughter informed her that she wanted to take the "barn away," and appellee told her, "You can't do that, I have no right to let the barns and buildings be destroyed," and that the daughter then said: "It is none of your business. It's mine and I'll do as I please with it." At that time her daughter also told her "that she had bought it for $500." This, appellee claims, is the first intimation that she had that her daughter claimed to own the life estate. Shortly after that, in September, 1929, the appellee consulted an attorney, W. A. Robertson, to ascertain what the claim of her daughter was based on. He investigated and found the quitclaim deed of record, and a few days thereafter made a demand upon the daughter to reconvey the life estate.

The life estate which the appellee conveyed to her daughter, Ada Murray, was a valuable interest in the real estate. At the time of the conveyance she had an expectancy of life of over nine years, the reasonable rental value of her life estate, as shown by the undisputed evidence, was at least $2,000 per annum.

We have held: "The consideration for a conveyance of a valuable interest in real estate must itself have some value, and if it is merely nominal, and there are indications of fraud or concealment of essential facts, equity will cancel such conveyance." *Krause v. Stevens,* 103 Neb. 463.

Where the evidence shows, as in this case, that a deed of a valuable interest in real estate was made by an aged woman of limited education and no business experience, without consideration, and there is evidence she did not know the instrument signed was a deed, but was led to believe and did believe it was a lease of her life estate therein, held sufficient to establish fraud, and equity will cancel such deed.

This being an action in equity involving questions of fact, which the law requires us to hear and determine as a trial *de novo* and to reach an independent conclusion without reference to the findings of the trial court, we have, in determining the weight of the evidence, where there is a conflict therein on a material issue, considered the fact that the trial court observed the witnesses and their manner of testifying. We have carefully examined the evidence and are convinced that the appellee executed the deed in question by being fraudulently induced to believe the instrument was a lease, that at the time of the signing of the same appellee did not know it was a conveyance of her life estate to her daughter, and that the same was without any consideration and in equity and good conscience should be canceled.

This brings us to a consideration of the cross-appeal of appellee.

The question presented by the cross-appeal is: Was the appellee entitled to rents and profits for the years 1926, 1927, and 1928? The trial court found that, by reason of a contract entered into by the appellee and appellants and others on the 7th day of October, 1929, she was not entitled to an accounting for rents and profits for the years mentioned.

It appears that before the contract, upon which the finding of the court was based, was entered into, appellee demanded of appellants a reconveyance of her life estate to her, and also a settlement for the rents and profits due her for the time they occupied the land under the quitclaim deed. Following said demand, a contract was drawn naming as parties thereto the appellee, the appellants and other heirs at law of Abraham Mast, deceased, and their spouses. The contract was signed by all the parties named, except one of the heirs having a small interest therein. As thus signed the contract was delivered.

The part of the contract on which the court denied appellee a recovery for rents and profits for the years 1926, 1927, and 1928 reads as follows:

"It is further agreed between the parties hereto that the said Edward Murray and Ada Murray are to pay to the said Mary E. Mast all rentals for the year commencing March 1st, 1929, and for all subsequent years during her life in case they continue as tenants of said premises. The said Edward Murray and Ada Murray being entitled to credit for any payments made by them in behalf of the said Mary E. Mast for any payments for living expenses, doctor's bill, necessary expenses, or advancements made to her for the year commencing March 1, 1929, and that in case the said Edward Murray and Ada Murray, or either of them, shall continue to farm said premises as tenants of the said Mary E. Mast, for and during her lifetime, and the said Mary E. Mast should depart this life after the said Edward Murray and Ada Murray or either of them have planted crops for said year, that the said Ada Murray and Edward Murray shall have the right to continue for said year as tenants of said place, and shall pay to the parties hereto, their *pro rata* share of the rentals in accordance with their proportion of the fee title to said premises, and that upon the expiration of said year, said lease shall terminate."

The quoted part of the contract is entirely independent of that part of the contract which provides for confirmation of the shares and interests of the parties, as fixed by the contract of March 11, 1926, the reconveyance by appellants to appellee of her life estate, and the conveyance by each of the heirs at law to one another, subject to said life estate.

The purpose of the quoted part of the contract was to settle a dispute between the appellee and appellants as to rents and profits during the time that appellants had been in possession thereof under the quitclaim deed. It is not contended by counsel for appellee but what the effect of said agreement was to relieve appellants of the payment of rents previous to March 1, 1929, but their contention is that such agreement was without consideration as far as appellee was concerned, and that it amounted to no

more than an offer to compromise and settle. The consideration moving to the appellee from the appellants was the renouncing of any claim by them for rents and profits under the quitclaim deed from March 1, 1929, and agreeing to attorn to the appellee for the rent for that year and all subsequent years that they might occupy the premises during her lifetime, and thereby recognizing the right of the appellee to the rents and profits from March 1, 1929, and for all subsequent years during her life by virtue of her life interest therein. In consideration of this, appellee renounced any claim that she might have for rents and profits previous to March 1, 1929. The consideration moving to the appellee was ample for her forgiving any claim that she might have for rents and profits previous to March 1, 1929. It was a settlement of the controversy between them as to rents and profits and not an offer to compromise. The finding of the trial court that appellee was not entitled to rents and profits for the years 1926, 1927, and 1928, by reason of said agreement, is right.

The amount allowed appellee for rents and profits by the trial court is amply supported by the evidence. The trial court took the lowest amount shown to be the reasonable rental value of the lands for each year and deducted all the credits claimed by appellants therefrom and found the balance to be the amount due therefor.

It is suggested by counsel for appellants that the decree of the trial court is wrong in that it provides for the payment of interest on annual rentals from March 1, 1929, before any rent was due. The decree provides: "That the plaintiff have and recover from the defendants the sum of $4,945.47 with interest at the rate of 7 per cent. per annum, on the annual rental when due beginning on March 1, 1929." It is the rule: "Where the rent is payable periodically as yearly, quarterly or the like, and there is no provision for payment in advance, it is not due and payable until the end of the year." 16 R. C. L. 928, sec. 436.

The agreement between the parties does not provide that the rent for the year 1929 should be payable in advance,

therefore the rent for the year 1929 did not become due until the 1st day of March, 1930. Interest should have been allowed only from March 1, 1930, when the rent for the year 1929 became due. The decree is modified so as to provide for interest on the annual rental, when due, beginning on March 1, 1930.

The decree, as modified, is affirmed.

AFFIRMED AS MODIFIED.

CHARLES LAKE, ADMINISTRATOR, APPELLANT, V. WILLIAM J. ROSE ET AL., APPELLEES: ELIZABETH TYNON ET AL., INTERVENERS, APPELLEES.

FILED JANUARY 13, 1932. No. 27963.

Principal and Agent: MORTGAGES: SUBROGATION. Where a confidential agent undertakes to invest the funds of his principal in loans secured by a first mortgage on real estate, and thereafter takes a mortgage on real estate to himself and a junior mortgage to secure a loan of the principal's funds, a court of equity will subordinate the mortgage lien of the agent to that of the principal.

APPEAL from the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Reversed, with directions.*

Kelligar & Kelligar, for appellant.

Paul Jessen, Ernest F. Armstrong, F. G. Hawxby and *E. Ferneau, contra.*

Heard before ROSE, GOOD and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

LANDIS, District Judge.

This is an appeal in equity from a decree of foreclosure of two mortgages and a determination of the priority of the respective mortgage liens. Appellant and appellees agree that both of the mortgages should be foreclosed, and the only contention is as to priority of the liens created by these mortgages.

Subsequent to the decree of foreclosure, Ruhamah Jane

Lake, plaintiff below, died intestate, and this action was revived in the name of Charles Lake, administrator of her estate, who is appellant here.

Ruhamah Jane Lake, referred to in the record as Mrs. Lake, was at the time of the trial 81 years of age. She had no business experience; did her banking at the Nemaha County Bank, and relied entirely on the various officers of the bank at all times.

In 1921 Mrs. Lake had a small real estate holding and $4,500 in United States Liberty bonds. She says Miss Elizabeth Tynon advised her to sell the bonds and loan the proceeds on a first mortgage on farm land and get 7 per cent. interest. The bank sold the bonds October 7, 1921, for $4,022.46, and proceeded to invest the same for Mrs. Lake. This investment by the bank for Mrs. Lake consisted in transferring to her its notes of W. J. Rose for $338 and $3,700. At the time the investment was made W. J. Rose owed the bank $21,257.82. He was not a first class credit risk, and it is a fair inference from the record that these notes were of doubtful value. W. J. Rose is now insolvent.

On May 22, 1924, W. J. Rose executed a mortgage on 160 acres to the Nemaha County Bank to secure a $4,038 note. By its terms the mortgage provides that it is subject to a $16,000 mortgage and one for $13,200. The bank surrendered the $338 and $3,700 notes of W. J. Rose belonging to Mrs. Lake for the $4,038 note and mortgage. On the same date W. J. Rose executed another mortgage on the same land to the Nemaha County Bank to secure five notes aggregating $13,200. The $4,038 mortgage was due May 22, 1925. The $13,200 mortgage had a due date of May 22 for $3,000 in each of the years 1925, 1926, 1927, and 1928, with $1,200 due May 22, 1929. No interest was ever paid on the $13,200 mortgage indebtedness; no assignments were produced for these mortgages, and at the time of the failure of the Nemaha County Bank in September, 1929, each of them was of record in the name of the bank in the office of the register of deeds of Nemaha county, Nebraska.

During all times pertinent to this case Elizabeth Tynon was a stockholder and active officer of the Nemaha County Bank. In the bank was an account carried in the name of Wm. Tynon for convenience, but which was a family account belonging to Elizabeth Tynon, her brother, and five sisters. Elizabeth Tynon had full charge of this account; made all investments therefrom for the interested parties, and annually each received one-seventh of the interest earned.

On May 23, 1924, while acting for herself and her brother and sisters, Elizabeth Tynon drew a check on this family account for $13,200 to the Nemaha County Bank for the W. J. Rose notes and mortgage. Each of the Tynons thus acquired an undivided one-seventh interest in the notes and mortgage.

Mrs. Lake was paid interest every six months by the bank, whether collected or not from W. J. Rose. The record shows that at times this interest was paid by Elizabeth Tynon as an officer of the bank. After the bank failed Mrs. Lake, for the first time, finds she has a third mortgage instead of a first mortgage. By receiving her interest regularly for years she was lulled into the belief that the proceeds of her bonds were at all times secure in a first mortgage, and having complete faith in the bank and Elizabeth Tynon, she relied on them with the childlike confidence of age.

The record convincingly shows that the officers of the bank took an unfair advantage of Mrs. Lake. Elizabeth Tynon, an active officer of the bank, with full knowledge of the situation, while acting for herself and others who gave her full authority to so act, gained, under the circumstances, the unfair advantage of a record preference over Mrs. Lake's mortgage, and comes into a court of equity, with her brother and sisters, seeking to confirm the priority of the Rose mortgage owned by the Tynons over the Rose mortgage owned by Mrs. Lake.

William A. Tynon, Katherine Tynon, Louise Tynon, Margaret Tynon, Rose Tynon, and Josephine Tynon Vance,

being the brother and five sisters who own six-sevenths of the Rose mortgage, had no knowledge of the acts of the bank officers and their dealings with Mrs. Lake. Each of these have the same equities as Mrs. Lake, and though in equity and good conscience, under the peculiar circumstances of this record, the priority of the one-seventh interest of Elizabeth Tynon in the Rose mortgage cannot be sustained, yet the brother and five sisters should be protected along with Mrs. Lake.

Upon a trial *de novo,* we reach the independent conclusion that the undivided six-sevenths interest of William A. Tynon, Katherine Tynon, Louise Tynon, Margaret Tynon, Rose Tynon, and Josephine Tynon Vance, the owners of the Rose mortgage, other than Elizabeth Tynon, and such portion of the Rose mortgage owned by Mrs. Lake as equals one-seventh of the Rose mortgage owned by the Tynons, should be and is found to be concurrent second liens. The balance due on the Rose mortgage owned by Mrs. Lake to be a third lien. Elizabeth Tynon's undivided one-seventh interest in the Rose mortgage to be a fourth lien.

The judgment of the district court is reversed and the cause remanded, with directions to enter decree in accordance with this opinion.

REVERSED.

JOHN A. MUTCHIE, APPELLEE, V. M. L. RAWLINGS ICE COMPANY, APPELLANT.

FILED JANUARY 13, 1932. No. 28092.

1. **Master and Servant: WORKMEN'S COMPENSATION ACT: COMPENSABLE INJURY.** Employee instructed by the manager of his employer to make a delivery of ice informed such manager that he had not had his evening meal, whereupon the manager told him to make the delivery, take the truck and go home for dinner, and then return the truck to the plant. In returning the truck from plaintiff's home to the plant it collided with another automobile and employee was injured. *Held,* that such injuries arose out of and in the course of employee's employment.
2. ———: ———: **WEEKLY WAGE.** Where employee had been employed over a period of several months on the basis of a

weekly salary, and less than one month prior to the happening of an accident resulting in injuries to the employee in the course of his employment, his salary was changed from a weekly to an hourly basis, the court, in determining such employee's weekly wage, will use as a basis of calculation his earnings during as much of the preceding six months as said employee worked for such employer in the same character of employment. Comp. St. 1929, sec. 48-126.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed in part, and reversed in part, and remanded, with directions.*

Sanden, Anderson & Gradwohl, for appellant.

Perry, Van Pelt & Marti, contra.

Heard before ROSE, GOOD, DAY and PAINE, JJ., and LESLIE, District Judge.

LESLIE, District Judge.

This action is brought under the workmen's compensation act by appellee, hereafter referred to as plaintiff, against appellant, hereafter referred to as defendant.

The plaintiff alleges that defendant was engaged in the ice business in Lincoln, and that on September 18, 1930, and prior thereto plaintiff had been employed by defendant in making deliveries and doing common labor; that on the 18th day of September, 1930, he received personal injuries resulting from an automobile collision, and that said collision and resulting injuries arose out of and in the course of his employment by the defendant.

The defendant by its answer denies that the injuries plaintiff sustained arose out of and in the course of plaintiff's employment by the defendant, and also filed a counterclaim against the plaintiff for $44.01 paid to the plaintiff by the defendant under an alleged misapprehension of fact.

On a trial had before the district court on appeal from the compensation commissioner, the district court found for the plaintiff, and that the plaintiff was entitled to recover from the defendant $12 a week on account of total disability from the date of the injury to May 1, 1931, a

total of 32 weeks, and $9 a week for 183 weeks, "or for the balance of the total of 215 weeks." From this judgment the defendant prosecutes appeal to this court.

Appellant's brief presents two questions for consideration by this court: (1) Does the evidence establish that the injuries resulted from an accident arising out of and in the course of plaintiff's employment with the defendant? (2) If so, was the award to plaintiff warranted by the evidence?

On the night in question the truck in which plaintiff was riding, and which belonged to the defendant, collided with another car on Forty-eighth street, in Lincoln, as plaintiff and his son were returning to the defendant's place of business from plaintiff's home in Havelock. The plaintiff and his son, a boy between 15 and 16 years of age, had been working for defendant that afternoon, and as they were about to leave the plant, an order came in for a delivery of ice to a station at Twenty-seventh and R streets, which plaintiff and his son were directed to make. It appears from the evidence that after leaving the plant they drove to Twenty-seventh and R streets, where the ice was delivered, and then to plaintiff's home in Havelock for dinner. After dinner the plaintiff, his son, who was driving the truck, and several friends, left plaintiff's home to return the truck to the plant. In doing this, they traveled over the route ordinarily taken in going from his home to the place of business of the defendant.

There is considerable conflict in the evidence as to the conversation had between the plaintiff and Rawlings, president and manager of the defendant company, before the order for ice came in.

Plaintiff's testimony is merely that Rawlings requested him to make a delivery, and that plaintiff reminded Rawlings that he had not yet had his evening meal; that Rawlings told him he might go from the substation at Twenty-seventh and R streets to his home in Havelock for dinner, bring the truck and ice bills back, and finish up any work needed to be done at the plant.

Rawlings testified, in substance, that after plaintiff and his son had finished the day's work plaintiff asked him if he would loan him a truck to go home with, and that he told him he would do so. That at that moment Walker, an employee of defendant company, came from the office with an order for a load of ice to be delivered at Twenty-seventh and R streets, and that Rawlings requested plaintiff to take the load, saying to him: "It will not delay you much, and we will pay you for it."

It is defendant's contention that after the plaintiff delivered the load at Twenty-seventh and R streets he was using the truck in his own service and not in the service of his employer. Shortly after learning of the details of the accident, Rawlings made a statement in writing as follows:

"Shortly before 9 o'clock p. m. on September 18, 1930, while John and Orville were still working at my ice plant, a call came in from Mr. Johnson at our substation at 27th and R streets. Johnson desired some ice brought to his station. I asked John and Orville to make the delivery. Something was said by John Mutchie to the effect that he had not yet had his evening meal, and he asked my permission to go from the substation * * * to his home in the south part of Havelock for something to eat before bringing the truck to the ice plant at 601 J street. I gave him permission to do so. I have often permitted him to go home for a meal when he was somewhere in the vicinity of his home at meal time.

"I believe Mr. Mutchie said something about getting permission to keep the car at home that night instead of bringing it back to the ice plant. I think I told him he might do that if it was too late when he had finished the delivery and his evening meal, but I would much prefer that he bring the truck back to the ice plant. I believe I reminded him that it was our custom and rule to have all the company cars left at the ice plant every night. I sent both Orville and John on this delivery to 27th and R Sts., and expected them to bring the truck back to the ice plant along with the receipted delivery ticket. * * *

"The accident occurred about ten o'clock on the evening of September 18th, I believe. Shortly after the accident I was informed of it. A few days later I paid both Orville and John up to date, and paid them for work until eleven o'clock on the evening of September 18th, inasmuch as I considered that they were working for me at the time of the accident.

"(Signed) M. L. Rawlings."

It is of no consequence that plaintiff may have asked defendant, before the order came in, to permit him to take the truck for his own use for the evening. It is undisputed that the order came for the ice; that Rawlings directed plaintiff to make the delivery; that he authorized him to go from Twenty-seventh and R streets to his home in Havelock for his evening meal, and that he instructed him then to take the truck back to the plant.

Had the accident occurred between Twenty-seventh and R streets and plaintiff's residence, it is questionable whether plaintiff could be said to have been in the service of the defendant at that particular time. However, the accident occurred on Forty-eighth street, between plaintiff's home and the ice plant, where defendant had instructed plaintiff to return the truck. Not only had he instructed him to return the truck, but to resume his labors at the plant if there was anything to do.

At the time of the collision the son, also an employee of defendant, was driving the truck, but under the supervision of plaintiff, to whom Rawlings had given instructions to return the truck to the plant. Since the plaintiff took the truck out in the service of defendant, and was returning it to the plant over the route he had been directed by defendant to travel, obviously his injuries arose out of and in the course of his employment, it seems to us.

It remains to consider the award made to the plaintiff. He had been employed by the defendant since July 1. Prior to August 23 he was paid $20 a week. From August 23 to September 18 plaintiff was employed on a different wage schedule, though engaged in the same character of employ-

ment. Subsequent to August 23 he delivered ice for the defendant from one of its trucks afternoons, evenings and Sundays, and was paid 30 cents an hour. Forenoons he delivered ice with a truck which belonged to his brother, and claims that his compensation for his forenoon activities was on a commission basis. Plaintiff paid his brother for use of his truck, and after doing this, and making settlement with defendant, testified his net commission was $18 to $20 a week.

Defendant's contention is that plaintiff was an independent contractor, and that his income for the work he performed forenoons was profit rather than commission.

The trial court found that plaintiff, in the operation of his truck forenoons, was an independent contractor, and we think the evidence supports this finding. The burden was upon the plaintiff to establish his agreement with the defendant, and the record, as we view it, does not show any contract between plaintiff and defendant with reference to plaintiff's employment by defendant forenoons. There is evidence that he got his ice from defendant, that defendant directed the route plaintiff should cover and the price that should be charged for ice sold, but this is insufficient to establish a contract of employment between the parties.

The trial court awarded plaintiff $12 a week on account of total disability from the date of the injury to May 1, 1931, or for a period of 32 weeks, and found that from May 2, 1931, plaintiff was entitled to 75 per cent. of $12, or $9 a week, "for 183 weeks, or for the balance of the total of 215 weeks." The defendant urges that the evidence does not justify an award on the basis of $18 a week, that $10.50 is the maximum that can be used as a basis for compensation. That is true if we consider only what was paid to the plaintiff during the month immediately preceding the accident. However, the law under which this action is brought provides:

"In continuous employments, if immediately prior to the accident the rate of wages was fixed by the * * * hour, * * * his weekly wages shall be taken to be his average

weekly income for the period of time ordinarily constituting his week's work, and using as the basis of calculation his earnings during as much of the preceding six months as he worked for the same employer." Comp. St. 1929, sec. 48-126.

Using as a basis for calculating plaintiff's earnings during the period of time he was employed by defendant from July 1 to September 18 we find it to have been approximately $18 a week, as the trial court found.

There seems to be no controversy as to the number of weeks (32) plaintiff was totally disabled, nor that defendant paid three weeks' compensation prior to commencement of this proceeding. No finding was made by the trial court as to the extent, or probable duration, of plaintiff's temporary partial disability.

Dr. George A. Lewis testified May 30, 1931, that his examination of plaintiff following the accident disclosed fractures of the tibia and fibula of the right leg, fracture of the right arm, and injury to the chest and back, and that he was at that time unable to do manual labor. When asked whether he had an opinion as to how long it would be before the leg would be all right again, he testified it would be mere speculation on his part, that the ultimate outcome would be speculative as to time.

Dr. Hollenbeck, another of plaintiff's physicians, testified on the same day that plaintiff was not then able to do full manual labor; that he was 75 per cent. disabled from manual labor; that his total disability ceased about May 1.

It is not contended by plaintiff that his injuries are of a permanent character. Section 48-121, Comp. St. 1929, provides:

"(1) For the first three hundred weeks of total disability, the compensation shall be sixty-six and two-thirds per centum of the wages received at the time of the injury. * * *

"(2) For disability partial in character * * * the compensation shall be sixty-six and two-thirds per centum of the difference between the wages received at the time of

the injury and the earning power of the employee * * * during the period of such partial disability; not, however, beyond three hundred weeks after the date of the accident causing disability."

We find no error in the judgment of the district court as to the amount of the award. It is not denied that plaintiff was totally disabled for a period of 32 weeks. His wages being $18 a week at the time of the accident, under the provisions of subdivision 1, sec. 48-121, Comp. St. 1929, the plaintiff was entitled to $12 a week during 32 weeks of total disability. According to the evidence of Doctors Lewis and Hollenbeck, plaintiff was partially disabled at the time of the trial to the extent of 75 per cent. They gave it as their opinion that this partial disability was temporary in character, but were unable to express an opinion as to the time over which it would extend. Subdivision 2, sec. 48-121, Comp. St. 1929, provides that for disability partial in character, the compensation shall be 66 2/3 per cent. of the difference between the wages received at the time of the injury and the earning power of the employee at the time the award is made. If plaintiff's disability was 75 per cent. and his wages at the time of receiving the injury were $18 a week, the difference between the wages he was receiving at the time of the injury and his earning power at the time of the trial was $13.50; two-thirds of this is $9, which was the award made by the lower court for the period following the total disability. The judgment of the lower court is correct as to the amount plaintiff was entitled to on account of total disability, and as to the amount to be paid to him during the period of temporary partial disability following total disability, but was in error in directing that it be paid over a period of "183 weeks, or for the balance of the total of 215 weeks." Plaintiff's claim for temporary partial disability is determined by subdivision 2, sec. 48-121, Comp. St. 1929, which provides that it shall be "during the period of such partial disability; not, however, beyond three hundred weeks after the date of the accident causing dis-

ability." The language of the decree was probably due to inadvertence, whoever prepared it having in mind the provisions of subdivision 3, sec. 48-121, Comp. St. 1929, which has to do with loss of a leg.

The decree of the trial court is affirmed in all particulars except as to the period of time during which plaintiff is entitled to compensation on account of temporary partial disability. The cause is remanded, with instructions to modify the original decree to conform to the views herein expressed.

Plaintiff's attorneys will be allowed a fee of $200 on account of services in this court.

AFFIRMED IN PART, AND REVERSED IN PART, AND REMANDED, WITH DIRECTIONS.

GEORGE DORAN V. STATE OF NEBRASKA.

FILED JANUARY 22, 1932. No. 28077.

ERROR to the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Reversed, with directions.*

Herbert W. Baird, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

PER CURIAM.

This is a writ of error to the district court for Lancaster county. The plaintiff in error, George Doran, hereafter called the defendant, was convicted of a first violation of the liquor law, and was sentenced to pay a fine of $100 and serve 60 days in the county jail.

The offense on which defendant was tried and convicted is described in the charging part of the complaint as follows: "George Doran on or about the 16th day of April,

1931, * * * did * * * unlawfully and wilfully have intoxicating liquor in his possession with intent to sell or dispose of the same." This language clearly, directly and unambiguously charges the offense of unlawful possession of intoxicating liquor, as defined and described in section 53-111, Comp. St. 1929. For this offense the authorized punishment is a fine of $100 *or* imprisonment in the county jail not less than 30 nor more than 60 days. Comp. St. 1929, sec. 53-151.

It being clear that the error in the sentence is the only error upon which this case should be reversed, however, there is ample authority for remanding the case for a resentence of the prisoner in accordance with section 53-151, Comp. St. 1929.

This court held in *Knothe v. State,* 115 Neb. 119, that the attempt to impose both a fine and a sentence in excess of its powers renders such sentence wholly void, and that a void sentence is no sentence.

The judgment of the district court is therefore reversed and the cause remanded to the district court, with instructions to pronounce sentence in accordance with the law.

REVERSED.

BLANCHE L. SHURTLEFF, APPELLEE, V. BANKERS NATIONAL LIFE INSURANCE COMPANY ET AL., APPELLANTS.

FILED JANUARY 22, 1932. NO. 28089.

1. **Statutory Provision.** "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Comp. St. 1929, sec. 20-853.
2. **Evidence** examined, and *held* to support the judgment of the trial court.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

G. E. Hager, for appellants.

John J. Ledwith, contra.

Heard before GOSS, C. J., EBERLY and PAINE, JJ., and BEGLEY and ELDRED, District Judges.

PER CURIAM.

This is an action at law by Blanche L. Shurtleff, appellee, hereinafter referred to as plaintiff, on a life insurance policy issued upon the life of her husband, Milburn C. Shurtleff, by the Bankers National Life Insurance Company, a Colorado corporation. The policy was a term policy, without cash or surrender value. The risk was reinsured by the Bankers National Life Insurance Company, a New Jersey corporation. There was a trial to the court, a jury being waived, resulting in a judgment for plaintiff. From the order overruling their motion for a new trial, the defendant corporations appeal.

There are substantially two questions presented by this record; one the action of the trial court in permitting an amendment to the pleadings by plaintiff, the other being whether the evidence presented to the trial court is sufficient to sustain the judgment.

The first amended petition of the plaintiff may be said to be in the usual form, and in it plaintiff alleged "that all of the conditions of said insurance policy were fully performed." This allegation was traversed by the defendants in their answer. They specifically alleged, in substance, the nonpayment of the quarterly premium due November 16, 1929; alleged that the insured gave his negotiable promissory note to the Colorado corporation on or about the 17th day of December in payment thereof, which was not in accord with the terms of the policy; that the defendants refused to receive the tendered note and immediately returned the same to deceased, and that on the 22d day of December, when the assured died, the insurance contract was not in force. By reply the plaintiff alleged facts which were claimed by her to establish that the defendants, by long, continued custom and practice of accepting the promissory notes of the insured in payment of premiums due on the policy in suit, had waived the payment of the premiums in cash, and were estopped to claim forfeiture

of the policy by reason of the failure of the insured to pay said premium in cash.

The defendants promptly moved to strike out the new matter contained in plaintiff's reply. The district court failed to rule on this motion, and proceeded with the trial. The defendants throughout the record preserved their rights by appropriate objections to evidence offered by plaintiff, which were overruled. After all the evidence adduced had been received, arguments had, and cause submitted to the court, the plaintiff filed a motion to set aside the rest and for leave to amend the pleadings to correspond to the proof in said action. This motion the trial court, over objections of the defendants, sustained. Plaintiff thereupon filed a second amended petition, setting forth therein the allegations that prior thereto had been contained in her reply, and thus, by amending, meeting the objections made by defendants to the former pleadings. To this pleading the defendants filed an amended answer, and to this amended answer thus filed plaintiff replied. The defendants challenge these proceedings as erroneous.

In the order of the trial court of December 13, 1930, setting aside the submission and permitting the filing of the amended pleading, it is set forth: "The new matters pleaded in the reply were, in substance, waiver and estoppel. The court is of the opinion that the matter pleaded should, in fact, have been alleged in the petition, and, inasmuch as detailed evidence was offered and received upon both of these questions, that a retrial and reproduction of all the same evidence would be an unnecessary consumption of time of both counsel and court. It is therefore ordered that the motion of the plaintiff to amend the petition by setting up the facts pleaded in the reply be sustained, and that the defendant be given leave to amend his answer thereafter, if desired, and that the defendant also be given leave to introduce such new evidence as it may desire. It is ordered that the plaintiff shall comply herewith within seven days and that the defendant be given until January 1st, 1931, to answer or plead to said amended petition."

The record thus discloses that by the order, quoted in part, as well as in the subsequent proceedings had, the substantial rights of the defendants were fully protected, and ample opportunity given to present their case under the amended pleadings. The statute controlling the disposition of assignments of error under consideration is: "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Comp. St. 1929, sec. 20-853.

On the merits, the insurance companies base their defense on the fact that a quarterly premium falling due on November 16, 1929, was not paid in cash on that day, or within 31 days thereafter. The policy in suit provides: "All premiums shall be payable in advance, * * * The payment of any premium or instalment thereof shall not maintain this policy in force beyond the date when the next premium or instalment thereof is payable." And "A grace of thirty-one days, without interest charge, shall be granted for the payment of every premium after the first." It is conceded in the record, however, that on the 14th day of December, 1929, and within the grace period, the assured executed a promissory note for the amount of the unpaid premium in the exact form as had been accepted by the company for the previous quarter, and forwarded the same to the home office of the company by mail. This premium note was there received by the company on the 16th day of December, 1929. In a letter dated December 17, 1929, this tendered note was returned by the company to the assured, their letter of transmittal stating: "This will acknowledge receipt of your note of $85.40, which we find it necessary to return to you because it is not on the form used by this company. We are also inclosing a new renewal premium note as is used by this company, together with a reinstatement blank because the grace period of your policy expired on November 16, 1929." It is conceded that the statement with reference to the expiration of the grace

period is an error. The "new renewal premium note," referred to in the company's letter and inclosed with it to the assured, was on the company's blank form, made out and ready for the assured's signature. The due date, amount and rate of interest on this instrument were evidently intended by the insurance company to be identical with the note tendered by the assured. It was received by the assured on December 20, immediately prior to the attack of illness in which he died. Evidence in the record justifies the conclusion that during the life of the policy in suit, excluding the first two payments (which were annual payments) and the one in controversy, the quarterly payments of premium on this policy were made as follows: Four were paid in cash, eleven by check, one by telegram, and four by promissory notes. From and including the first payment made by promissory note (6-13-27) to the transaction in suit, nine payments had been made, four of which were by use of promissory notes and five by check, and in the tenth and last transaction the defendant companies did not deny the right of the assured to pay by note, but their letter expressly approves a note on their own form intended to be substantially in accord with the note tendered by the assured, save as to certain provisions with reference to the consideration which were admittedly additional to the forms theretofore in use by the parties. We are not referred to any evidence of special negotiations had between the parties preceding the employment of any of the notes referred to in the record. The assured was himself engaged in the insurance business, and like the officers of defendants presumably was familiar with the customs therein, and, in reliance on that fact, each of the four notes used in satisfaction of quarterly premiums was apparently made, tendered, accepted, and employed by all in a manner quite consistent with a known, established course of business between the parties in this case. It is admitted in the evidence that the insurance companies were acquainted with the assured's financial standing, and understood that he was worth $25,000. And it is also an admitted fact that

the form of promissory note insisted upon by the insurance company was the result of some sort of an agreement between the executive officers in charge of the company's business, arrived at during the previous October, and had never before been required of the assured by the organization. Of this change in form of the renewal premium note, it is evident the assured had been given no notice, and had no actual knowledge. The controlling question, therefore, is: Does the evidence disclose an established course of business between the parties to this policy which the company violated?

"Forfeitures are not favored in the law; and courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action, on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract." *Hartford Life & Annuity Ins. Co. v. Eastman,* 54 Neb. 90. The defendants, conceding this principle, insist that the controlling rule is: "Evidence of the acceptance of one single overdue premium or assessment, or of a few separate instances, is insufficient of itself to establish a waiver of forfeiture claimed for nonpayment of a subsequent premium or assessment. * * * The rule stated in a prior section presupposes such an habitual and uniform custom as to warrant the presumption that the insured was justified in believing that he could safely delay payment, notwithstanding the terms of his contract; such custom as is shown by an examination of the cases may have extended over a number of years, and the instances may not have occurred consecutively, * * * or there may have been several consecutive instances immediately preceding the time of payment of the last premium or assessment, so those paid

when overdue may have sustained such a proportion to the whole number of payments during a given period of time as to warrant the presumption of a waiver." 3 Joyce, Law of Insurance (2d ed.) sec. 1368. In view of the admitted facts of the record, including the failure of the company to object to any of the tendered notes because they were not cash, and also the fact that it objected to the last note tendered solely because it was not a note on the company's form, a requirement of which the assured had no notice, we find the evidence is ample to sustain the conclusion that, under the course of business established, the assured was, in the instant case, justified in believing that by conforming thereto the forfeiture of his policy would not be incurred.

It follows, therefore, that the action of the trial court was correct, and its judgment is

AFFIRMED.

WILLIAM HARRY GILBERT, APPELLEE, V. WELCH RESTAURANT COMPANY: CITY OF OMAHA, APPELLANT.

FILED JANUARY 22, 1932. NO. 27970.

1. **Municipal Corporations: INJURIES TO PEDESTRIANS: LIABILITY.** A defective billboard erected on the top, and close to the side, of a two-story building cannot be designated a defect in a street or sidewalk within the meaning of sections 14-801 and 14-802, Comp. St. 1929, providing that a city of the metropolitan class shall be exempt from liability for personal injuries arising by reason of defective public ways or sidewalks, unless notice of such defective condition shall have been given within five days before the accident.
2. ———: ———: ———. A city of the metropolitan class will not be relieved from liability arising from injuries sustained by a pedestrian when a defective billboard fell from the top of a two-story building striking him and thereby inflicting serious and permanent injuries upon his person, when the record discloses that the defective condition of the billboard could have been discovered by the exercise of ordinary care and diligence on the part of the proper officers of the city.
3. **Evidence** examined, discussed in the opinion, and *held*, that the verdict is not excessive.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

John F. Moriarty, Harry B. Fleharty, Thomas J. O'Brien and *Bernard J. Boyle,* for appellant.

Mullen & Morrissey, James H. Hanley, Paul P. Massey and *Arthur Mullen, Jr., contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and WRIGHT, District Judge.

DEAN, J.

This is a personal injury action from Omaha wherein William Harry Gilbert alleged that on or about December 19, 1929, an electric display sign or billboard fell from the top of a two-story building to the sidewalk, striking him and thereby inflicting severe and permanent injuries upon his person. The building was owned by Gertrude M. Welch and George Seletos, and was then occupied by the Welch Restaurant Company. The city of Omaha was joined in the action as a party defendant. Subsequently a settlement for $14,000 was effected as between Gilbert and the defendants Gertrude M. Welch, George Seletos, and the Welch Restaurant Company. Thereupon the action proceeded as against the city of Omaha alone. Upon submission the jury returned a verdict for $6,500 in favor of the plaintiff. The city has appealed.

Counsel for the city contend that a defective structure on private property is not a defect in a public highway giving rise to municipal liability for injuries. Section 14-801, Comp. St. 1929, so far as applicable here, provides that no city shall be liable for damages arising from defective streets, alleys, sidewalks, public parks, or other public places, unless notice of the nature and extent of the injuries shall have been given to the city within ten days after the injuries were incurred. It may here be observed that notice of the plaintiff's injuries was given to the city within the time above pointed out. And section 14-802, Comp. St. 1929, provides that cities of the metropolitan

class shall be exempt from liability for damages for injuries by reason of defective public ways or sidewalks, unless notice of the defective condition shall have been filed with the city authorities within five days before the accident. No notice was given in the present case of the defective condition of the billboard prior to the accident.

It may be noted that the defective condition of the billboard, owing to its elevated condition, was not perceptible to the public generally as a menace to pedestrians. Nor does it appear that the billboard constituted a defect in the street or sidewalk within the meaning of the above cited sections of the statute requiring notice of such defect. It has been held: "Objects which have no necessary connection with the roadbed or relation to the public travel thereon, and the danger from which arises from mere casual proximity and not from the use of the road for the purpose of traveling thereon, will not as a general rule render the road defective." *Hewison v. New Haven*, 34 Conn. 136, 91 Am. Dec. 718. See *Andresen v. Lexington*, 240 Mass. 517; *Bohm v. Racette*, 118 Kan. 670. See, also, *Muffley v. Village of St. Edward*, 110 Neb. 572; *Lund v. City of Seattle*, 99 Wash. 300; *Langan v. City of Atchison*, 35 Kan. 318. And it is elementary that it is the duty of municipal corporations to maintain its streets in a safe and proper condition for pedestrians, and this duty extends to such dangers as are contiguous to such streets. *Town of New Castle v. Grubbs*, 171 Ind. 482.

It does not appear that any permit was ever issued at any time by the city for the erection of the billboard in question here. Nor does it appear that the billboard was inspected at the time of its erection or at any time thereafter. But the fact that the city authorities did not know of the faulty condition of the billboard does not relieve the city from liability in the premises. In *Shippey v. Kansas City*, 254 Mo. 1, the city was held liable for injuries resulting from negligence in its failure to repair a defective billboard, "when it had timely notice of, or by the use of ordinary care and watchfulness could have discovered, the

defect in time to have prevented the injury" there complained of. And it was also held in the *Shippey* case that the city was not to be relieved from liability through negligence on the part of the proper officer to make a sufficiently frequent examination of the billboard to have discovered the defect in time to prevent the accident. We have held: "The making, improving, repairing, keeping in repair and in a safe condition, of streets and sidewalks by a municipal corporation relate to its corporate interests only, and it is liable for the wrongful or negligent acts of its agents in performing such duties." *Tewksbury v. City of Lincoln*, 84 Neb. 571. See *Sheets v. City of McCook*, 95 Neb. 139.

There is evidence tending to prove that the billboard here in question was insecurely fastened and that the braces were decayed and rotted. But the city complains of the admission of evidence in respect of the condition of the billboard, for the reason that it is alleged the city had no knowledge of any investigation nor was it ever advised in respect of the result of any inspection thereof. It appears, nevertheless, that a sign painter testified that, in the year prior to the accident herein, he refused to paint the billboard in suit, for the reason that it was impossible, owing to the decayed condition of the billboard, to safely and securely fasten a scaffold thereon. The evidence of this witness was clearly admissible from the fact that it fairly disclosed the decayed condition of the billboard. *Bemis v. City of Omaha*, 81 Neb. 352. The city contends that the defect in the construction of the billboard may have been latent and may not have been discovered had an inspection thereof been made. But, even if an inspection of the billboard had not revealed its true condition, the question was nevertheless one for the jury. We do not think the court erred in admitting the evidence in respect thereof. It does not appear to us that the city should be relieved from liability herein; and this from the fact that the defective condition of the billboard could have been discovered by the exercise of ordinary care and diligence on the part of the proper officers of the city in the inspection thereof.

The city complains that the verdict is excessive and that the settlement between the plaintiff and the defendants Welch, Seletos, and the Welch Restaurant Company sufficiently compensates him for his injuries. It is to be noted, however, that the plaintiff at the time of the accident was 27 years of age, married, and the father of two infant children. From the testimony of his physicians, it appears that the plaintiff's injuries are of a permanent nature. The record discloses that his skull was fractured, and that the bones were shattered and driven into his brain, from which fragments were removed. A considerable area of the brain is now exposed without covering, thereby causing a delicate condition. It also appears that the plaintiff's jaw bones were badly crushed and that it became necessary to replace some of his teeth which were out of alignment. The bones in the back of his left hand were broken, and his left knee also was broken, and the plaintiff will be unable to do any manual labor in the future. We do not think, in view of the record, that the verdict is excessive.

The city also makes this contention, namely: "With the theory of liability for failure to abate a nuisance withdrawn, the trial court substituted a theory of liability for negligence not involved in the petition and wrongfully submitted said theory to the jury." The petition, however, alleges that the city negligently permitted the billboard in question to remain in the unsafe condition and that the billboard therefore constituted a nuisance. Upon an examination of the petition, we do not think there is merit in the contention of the city, nor do we find that the court erred in submitting the question of negligence of the city to the jury.

The judgment is

AFFIRMED.

LOUIS RICHTMYER, APPELLEE, V. MUTUAL LIVE STOCK COMMISSION COMPANY, APPELLANT.

FILED JANUARY 22, 1932. No. 27867.

1. **Conversion:** MEASURE OF DAMAGES. In an action for conversion, the value of the property at the time and place of conversion, with interest from that time, is generally the measure of damage.
2. ———: ———: PLACE OF CONVERSION. Where property has been stolen from the owner, removed and soon thereafter consigned by the thief to a commission merchant who, without notice or knowledge that the property was stolen, received and disposed of the same in the usual course of business and was thereupon sued for conversion, the time and place of conversion which controls the value in such case is that of the receipt and disposal of the property by the commission merchant.
3. ———: ———: ———. In the instant case, evidence of the value at either the place of the original taking or of the disposal seems relevant.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Reversed.*

Crofoot, Fraser, Connolly & Stryker, for appellant.

Daniel J. Gross and *Ivan D. Evans, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and BLACKLEDGE, District Judge.

BLACKLEDGE, District Judge.

This action is by the plaintiff, appellee, for the conversion of certain cattle which were stolen from his ranch in Cherry county; and its object, to recover the value of the cattle from the defendant, which as a live stock commission merchant, some seven days after the theft, received the cattle at Omaha on shipment from the thief, and sold them in the usual course on the market.

In the briefing and submission of the case in this court, all assignments of error are eliminated except the one which involves the proper measure of damage to be applied in the case.

The defendant contends that, the jury having found for plaintiff upon the identity of the cattle, it is liable to plaintiff in some amount, as having handled and disposed of the stolen property, but insists that the value for which it may be held to account is that in Omaha where it received and dealt with the property. It claims to have acted innocently and in good faith, without knowledge of the prior theft and conversion; and this fact is conceded by plaintiff, who states in his brief: "We wish to make it clear that we do not charge the defendant with any culpability."

The plaintiff contends, and the trial court adopted the theory, that the proper measure of damage was the value of the cattle in Cherry county at the time of the original taking by the thief, with interest from that date. Evidence was either received or excluded in the trial in accordance with that theory, and the jury were so instructed.

The cattle were pure bred registered Herefords, valuable for breeding purposes. They were sold on the market as ordinary beef cattle, netting the shipper some $1,000. Their value as pure breds in Cherry county is amply sustained by the evidence at $3,500, which the jury found. The defendant was not permitted to show the value of such cattle at Omaha.

Both parties concede that the general rule for the measure of damages for conversion is the value of the property at the time and place of conversion, with interest from that date. Here they part company, however, and each seeks to apply that statement, as an unbending and all-inclusive rule, to the facts of his own case. Plaintiff urges that his loss occurred at the original taking, and that this unalterably fixes the time and place governing the value to be allowed, regardless of the remoteness of time or place when and where they came into possession of defendant, or of the innocence or culpability of the defendant, who had no part in the original taking and became liable solely by having, in the usual course of business, handled and disposed of the stolen property, and regardless also of the condition or value of the property at the time defendant came into possession.

Plaintiff further urges that, in receiving the cattle consigned to it by the thief, defendant became the agent of the thief and so liable in the same measure as would be the original taker as principal; and that the taking of the cattle by Gross, his shipment of them to defendant at Omaha, and their subsequent sale and remittance of the proceeds were all consecutive steps in the conversion, the sale by defendant being merely the completion of the acts that constituted the conversion. The infirmity in this argument so far as concerns plaintiff's case is that it proves too much to result in any strengthening of plaintiff's position. For, if these were successive steps in the one conversion and the final sale the completion thereof, it necessarily follows that it, being made in Omaha, the time and place of that act, as well as the acts in Cherry county, must be considered in the application of the rule of damage. There is some merit in defendant's argument that it should not, as agent, be chargeable with acts of which it knew nothing, and which took place before any agency was, or under the facts in this case could have been, created.

That the general rule hereinbefore stated of the measure of damages for conversion is the law of this state, there can be no doubt. 26 R. C. L. 1147, sec. 61; 26 R. C. L. 1148, sec. 63; *Bennett v. McDonald,* 59 Neb. 234; *Woodworth v. Hascall,* 59 Neb. 124; *Halbert v. Rosenbalm,* 49 Neb. 498; *Kasper v. Walla,* 49 Neb. 288; *Carpenter v. Lingenfelter,* 42 Neb. 728; and many other cases.

It does not follow, however, that it is so unyielding and all inclusive that no account should be taken of the facts attendant upon the conversion, the entrance of defendant into the zone of liability, or the location or condition of the property at that time. Courts have often considered the condition of the converted property as it came into the hands of the defendant, and, upon comparison with its condition when originally taken, modified the measure of damage as it is hereinbefore stated. This has generally occurred in cases wherein the property had been increased in value by some process of trade or manufacture. In

some instances the plaintiff was awarded the value as increased, upon the ground that it was made by the wrongdoer himself who should not be permitted to thus profit by his own act and in effect compel an involuntary sale by plaintiff. *Wooden-Ware Co. v. United States*, 106 U. S. 432. In *Pine River Logging & Improvement Co. v. United States*, 186 U. S. 279, it is said: "The cases involving this distinction and in line with the *Wooden-Ware* case are abundant, both in the federal and state courts, and are too numerous even for citation."

In many cases the courts rest a distinction upon the ground that the defendant, not being an intentional wrongdoer, came innocently into possession of the property, and allow the defendant credit for any increase in value contributed by him, although holding him to account for the condition of the property as it came into his hands. *Winchester v. Craig*, 33 Mich. 205; *Railway Co. v. Hutchins*, 32 Ohio St. 571, 30 Am. Rep. 629; *Silsbury v. McCoon*, 3 N. Y. 379; *Stuart v. Phelps*, 39 Ia. 14. In *Ellis v. Wire*, 33 Ind. 127, 5 Am. Rep. 189, it is said: "The sale of the wheat was its actual conversion by the defendant, and its value at that time, in the form in which he sold it, was the measure of damages, if the plaintiff was content therewith; though we think he was entitled to the highest price of the property at any time between the taking and the sale."

This court, as stated in the opinion by Letton, J., in *Clay v. Palmer*, 104 Neb. 476, has adopted a slight modification of the rule in *Wooden-Ware Co. v. United States*, 106 U. S. 432, and follows that of *Carpenter v. Lingenfelter*, 42 Neb. 728, to the effect that the original value only is to be given the owner, regardless of whether the increase was made by a wilful wrong-doer or by one in good faith.

In *Potter v. United States*, 122 Fed. 49, Sanborn, J., in discussing the matter of damages and the bad or good faith of the purchaser who had been sued, says: "The measure of damages for the conversion by an innocent purchaser from a wilful trespasser is the value of the property converted at the time of the purchase."

A number of Nebraska cases, in addition to those herein noted, have been cited in the briefs of counsel. None of them determine a situation as between the owner and an unintentional wrong-doer. They all were suits against the original wilful trespasser. No case has been cited to us which involves a decrease in the value of the property after the taking or at the time it reached the hands of defendant who is called upon to account, and a rather diligent search has failed to discover any judicial determination of that question.

Examination of the precedents does disclose, however, that the inquiry as to the value of the converted property is by no means limited to the immediate time or place of the original taking, but is to be governed largely by the facts of the particular case on trial. Whatever distinctions may be drawn by or from the *Wooden-Ware* case, and later adjudications by that court, they do approve inquiry as to value at a time and place more or less remote from the original taking. The same is true as to the cases cited from Michigan and Indiana, and is recognized in *Wallingford v. Kaiser*, 191 N. Y. 392, 123 Am. St. Rep. 600. In *Alexander v. Swackhamer*, 105 Ind. 81, 55 Am. Rep. 180, the court recognized the act in which the defendant actually participated, after the original taking, as constituting the ground for recovery. Alexander & Company innocently came into possession of cattle which had been fraudulently obtained from the owner. The court say: "When therefore Alexander & Company sold the cattle, they sold the property to which the plaintiff had a perfect title, and when they received the proceeds of such sale they received money which belonged to the plaintiff. This amounted to a conversion of the plaintiff's property for which they were liable." And although the value of property at the time of conversion is generally the measure of damage in such cases, to ascertain that value, however, evidence of its worth a reasonable time prior and subsequent to the conversion is admissible. *Austin v. Vanderbilt*, 48 Or. 206, 120 Am. St. Rep. 800. See 26 R. C. L. 1147, sec. 61.

The court must consider here the rights of the two parties, each without culpability, in relation to the facts upon which the case rests. The plaintiff should of course have full recovery for the loss at the time sustained; and so he would if his suit ran against the original taker. The original taker is not a party to this action. The defendant became unwittingly involved by the circumstance of having dealt with and disposed of the property. If the property was of less value when and where defendant got it, one of two innocent parties must suffer loss. A fixed rule of law for the protection of property owners puts upon one so dealing with stolen property the duty, no matter how innocently he dealt, to account to the true owner for its value. Upon what theory of substantial justice can either of these be entitled to preferential treatment at the hands of the court? Upon what theory of right shall the defendant, without culpability itself, but bound nevertheless to render to the true owner the value of the property in which it dealt, be required to submit to an additional penalty for the wrongful act of another in which it had no part? It is presumed of course to know the value of the property in which it dealt at the time and place it got it, and to take the risk of dealing with the lawful owner; but by what just means can it be held further chargeable with knowledge of, or liability for, an additional value that it could not see and did not know, and which was not in fact then in the property?

This all leads to the conclusion that in such cases "the time and place of conversion" to be considered, and which controls on the question of value, is that fixed by the acts of the defendant in its dealing with the property, rather than the original taking in which defendant had no part. The trial court was in error in excluding evidence as to the value of the property at Omaha, and in instructing the jury that the value in Cherry county on the date of the theft was the only value to be considered. This gives to the plaintiff full compensation for his loss in so far as the defendant had any connection with it, holds de-

fendant responsible for the full value of that in which it dealt, without attaching additional penalty for the acts of another, and seems to us a just and salutary rule.

It is not to be understood, however, that the value of the property in Cherry county, so recently before the conversion by defendant, becomes immaterial in the case. The limits of the inquiry should not in this case be so confined. The value there at that time might well tend to show the value on shipment to Omaha. Also whether the cattle in question were pure breds or only beef cattle was one of the issues in the case. We judicially know the relative location of the counties and cities in the state and approximate distances and the general routes of travel; and that Omaha is the principal live stock market in the state and probably the one most accessible from Cherry county. It seems reasonable that in this investigation the values at either place would be relevant in fixing the actual value of the property at the time and place of the acts of the defendant in relation thereto.

For the reasons stated, the judgment of the district court is reversed and a new trial awarded.

REVERSED.

EMMA CORR, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED JANUARY 22, 1932. NO. 27965.

Appeal: REMITTITUR. On appeal in an action for damages, a judgment on a verdict which the clear preponderance of the evidence shows to be excessive may be reversed unless appellee files a remittitur for the excess.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Affirmed on condition.*

John F. Moriarty, Bernard J. Boyle and *Thomas J. O'Brien*, for appellant.

O'Sullivan & Southard, contra.

Heard before ROSE, GOOD and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

CHAPPELL, District Judge.

The City of Omaha appeals from the verdict of a jury and a judgment rendered thereon awarding appellee, Emma Corr, $9,500 as damages for the appropriation of certain real estate belonging to appellee for the purpose of extending its system of parks and boulevards.

The only assignments of error relied upon in this court are (1) that the verdict is not sustained by sufficient evidence; (2) that the damages are excessive.

Ordinarily, the damages are for the determination of the jury, and it is with the greatest reluctance the courts will, in a manner, substitute their judgment for that of a jury. However, at an early period this court said: "To justify an interference with the finding of a court or jury, the preponderance of evidence must be clear, obvious and decided; but when the preponderance is so great, it is the duty of the reviewing court to correct the mistake." *Fried v. Remington*, 5 Neb. 525. This court has consistently adhered to that position, and only recently has said: "Where the verdict of a jury is clearly against the weight and reasonableness of the evidence, it will be set aside and a new trial granted." *Bentley v. Hoagland*, 94 Neb. 442; *Stewart v. City of Lincoln*, 114 Neb. 362. In the case of *Stewart v. City of Lincoln, supra*, Morrissey, C.J., in his opinion, says: "This court may be reluctant to disturb the findings of a jury, nevertheless, it has never refused so to do, where to sustain the verdict palpable injustice would result."

This court and courts in other jurisdictions have said that when a verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts that it shocks the sense of justice and raises at once a strong presumption that it is based on prejudice, passion, or mistake, rather than on sober judgment, the appellate court should not hesitate to set it aside or direct a remittitur, even though the trial court has refused to do so. 2 R. C. L. 199, sec. 170; *Kurpgeweit v. Kirby*, 88 Neb. 72; *Garfield v. Hodges & Baldwin*, 90 Neb. 122; *Tyler v.*

Hoover, 92 Neb. 221; *Burge v. Adams Co.*, 98 Neb. 4; *In re Estate of O'Connor*, 105 Neb. 88; *Trute v. Holden*, 118 Neb. 449; *Wiles v. Department of Public Works*, 120 Neb. 689.

Without setting forth the evidence in detail or commenting particularly thereon, it is the opinion of this court, after careful examination of the evidence and the authorities, that a clear preponderance of the evidence shows that damages in the sum of $9,500 are excessive to the extent of $3,000.

For the reason above stated, the judgment should be reversed, and this will be done unless the appellee shall, within 30 days, remit the sum of $3,000, leaving a judgment for $6,500.

AFFIRMED ON CONDITION.

CHARLES F. BARTH ET AL., APPELLANTS, V. LINCOLN TELEPHONE & TELEGRAPH COMPANY, APPELLEE.

FILED JANUARY 22, 1932. No. 27730.

1. **Quære.** Whether a motion for a new trial is a prerequisite to an appeal to the supreme court from an order of the state railway commission, *quære?*
2. **Appeal: TIME.** Time for perfecting an appeal to the supreme court from an order of the state railway commission cannot be extended by the filing of a motion for a new trial out of time.
3. ———: JURISDICTION. To give the supreme court jurisdiction on appeal from the state railway commission, a transcript of its proceedings must be filed within three months from the date of the final order.

APPEAL from the State Railway Commission: *Appeal dismissed.*

J. J. Thomas, Charles F. Barth, C. A. Sorensen, Attorney General, and *Hugh La Master,* for appellants.

Woods, Woods & Aitken, contra.

Heard before ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ., and HORTH, District Judge.

HORTH, District Judge.

The Lincoln Telephone & Telegraph Company, a Nebraska corporation, appellee herein, filed its application with the Nebraska state railway commission for authority to place into effect a revised and advanced schedule of rates at its telephone exchange in the city of Seward, after rebuilding its plant and converting the same from a manual to an automatic system.

Charles F. Barth and Harry A. Cummins and the Seward Chamber of Commerce of Seward, Nebraska, for themselves and others similarly situated, appellants herein, appeared informally at the hearings before the railway commission upon the application of the appellee, made written requests for the production of certain records of the appellee, cross-examined witnesses produced by the appellee in support of its application, called and examined witnesses in their own behalf, and after the railway commission had entered an order, under date of June 16, 1930, authorizing appellee to publish and collect a revised and advanced schedule of rates for automatic telephone service at the Seward exchange, appellants, under date of June 21, 1930, filed with the railway commission a motion for new trial and rehearing, which was on the 15th day of August, 1930, overruled by the railway commission. Appellants thereupon gave notice of appeal, and for the purpose of perfecting the same, and under date of October 1, 1930, filed with the clerk of this court their transcript.

The dates above given are material, for it is the contention of the appellee that appellants did not file their transcript with the clerk of this court within the time fixed by statute, and that by reason thereof this court has no jurisdiction to hear or consider the case, and it is this challenge to the jurisdiction of the court that first demands our attention.

The order of the state railway commission from which this appeal is undertaken bears date June 16, 1930. The motion for a new trial was filed June 21, 1930, and the transcript was filed with the clerk of this court on October

1, 1930. The law providing for appeals from orders and decisions of the state railway commission is set forth in section 75-505, Comp. St. 1929, and, in so far as it is material to the question here involved, reads:

"The procedure to obtain such reversal, modification or vacation of any such order or regulation made and adopted, upon which a hearing has been had before the commission, shall be governed by the same provisions now in force with reference to appeals and error proceedings from the district court to the supreme court of Nebraska. The evidence presented before the railway commission, as reported by its official stenographer and reduced to writing, shall be duly certified by the stenographer and the chairman of the railway commission as the true bill of exceptions, which, together with the pleadings and filings duly certified in the case under the seal of the railway commission, shall constitute the complete record and the evidence upon which the case shall be presented to the appellate court: Provided, however, the time for appeal from the orders and rulings of the railway commission to the supreme court shall be limited to three months."

When a motion for a new trial is a necessary step to perfect an appeal from the district court to this court, such motion, when no question of newly discovered evidence is involved, must be made within three days from the date the decision is rendered unless "unavoidably prevented." Comp. St. 1929, sec. 20-1143. Appellants seek to avoid the delay in making their motion for new trial within the time prescribed by law, by filing herein, on May 19, 1931, a supplemental transcript, by leave of court, consisting of an affidavit reading as follows:

"State of Nebraska, }
County of Seward. } ss.

"I, Chas. F. Barth, being first duly sworn on oath depose and say that I was one of the attorneys for the Seward Exchange subscribers.

"That I appeared in said proceeding for and on behalf of the subscribers thereof and the Chamber of Commerce

of the City of Seward; that the first notice which I had of the commission's order entered herein was on June 20, 1930, about the hour of 9:00 when the morning mail was delivered; that I then received the copy of the order of the commission transmitted to me by the secretary thereof under date of June 19, 1930, mailed from the office of the Railway Commission in Lincoln, Nebraska; on the same day I prepared a motion for new trial and rehearing and deposited the same in the mails directed to the Nebraska State Railway Commission; that it was impossible for me to have filed a motion for new trial or rehearing before the 20th day of June, 1930, as that was the day on which I first received notice from the commission, that the order was received in the morning and the same day the motion was sent out.

"(Signed) Chas. F. Barth.

"Subscribed in my presence and sworn to before me this —— day of May, 1931.

"(Signed) L. H. McKillip,
"Notary Public.

"(Seal) My commission expires Jan. 19, 1935."

No finding by the railway commission that appellants were "unavoidably prevented" from filing their motion for new trial within three days after the findings and decision of the railway commission from which they seek to appeal appears in the record. In *Aultman, Miller & Co. v. Leahey*, 24 Neb. 286, paragraph one of the syllabus reads:

"A question raised and presented only by a motion for a new trial, made after the expiration of three days after the verdict or decision, or by an amendment made after such three days to a motion previously filed in any case not specially excepted by the provisions of section 316 of the Code, should not be considered by the trial court, and if it is, such consideration will not be held binding by this court."

In the body of the opinion in the above case, Justice Cobb, in speaking upon the question here under consideration, said:

"This amendment embodies a new and definite assignment of error. It was not made until the fourth day after the verdict was rendered, after the expiration of the time limited by the Code, without the finding by the court that the plaintiff 'was unavoidably prevented' from a compliance with the statute, as a palliation for the amendment."

In *Davis v. Taylor & Son*, 92 Neb. 769, paragraph two of the syllabus reads:

" 'Questions presented by an amendment to a motion for a new trial, made more than three days after verdict and without a finding of the court that the party was unavoidably prevented from presenting such questions within three days from the verdict, will not be considered by this court.' *Gullion v. Traver*, 64 Neb. 51."

Whether a motion for new trial was a necessary step in order to obtain a review of the findings and decision of the state railway commission is not decided; but, if it was necessary, such motion was not filed within the time limited by the Code and was, therefore, of no avail. If, however, the filing and overruling of a motion for a new trial was not a necessary proceeding for such a review in this court, then the transcript for appeal, having been filed in this court more than three months after the date of the findings and decision of the state railway commission from which appellants seek relief, would not give the court jurisdiction and the appeal should be dismissed. *Splittgerber Bros. v. Skinner Packing Co.*, 119 Neb. 135.

The appeal is, therefore, dismissed at appellants' costs.

APPEAL DISMISSED.

MATTHEW J. MORRISSEY, APPELLANT, V. TRAVELERS PROTECTIVE ASSOCIATION, APPELLEE.

FILED JANUARY 22, 1932. No. 28006.

1. **Insurance: APPLICATION: FALSE STATEMENTS.** Where an applicant for insurance in a fraternal beneficiary association makes untruthful statements to the association in an application for insurance prepared by himself as a basis for insurance, and

which statements are material to the risk of insurance, said association is not estopped to deny its liability under its policy or certificate of membership, even though the member of said association who solicited said applicant knew of the untruthfulness of said statements so made by said applicant.

2. ———: ———: ———: PRINCIPAL AND AGENT: NOTICE TO AGENT. The general rule which imputes knowledge of an agent to his principal does not extend to a case where a member of a fraternal beneficiary association solicits one to join said association and the one solicited prepares his own application and makes representations therein material to the risk of insurance that both the applicant and the soliciting member know to be untruthful.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

J. W. Kinsinger, H. C. Henderson and *Lincoln Frost, Jr.*, for appellant.

Hall, Cline & Williams, contra.

Heard before ROSE, GOOD, DAY and PAINE, JJ., and LESLIE, District Judge.

LESLIE, District Judge.

The defendant is a fraternal beneficiary association and issued its policy in the form of a certificate of membership to the plaintiff April 25, 1930, upon application made in the usual manner by plaintiff through a member of the association. The certificate provides for death and accident benefits. About a month after the issuance of the policy the plaintiff met with an accident resulting in an injury to his right eye necessitating its removal. The defendant denies liability under its policy, and alleges that it was induced to issue it because of false representations by the plaintiff in his application with reference to his eyesight, and that said representations were warranties and material to the risk of insurance. One of the interrogatories propounded to the plaintiff in the application was: "Is your eyesight impaired?" To which plaintiff wrote as his answer, "No." The plaintiff admits the untruthfulness of his answer, and that at the time he had

a traumatic cataract of the left eye of such seriousness that he had practically no sight in it. He contends, however, that when he came to this question he asked the member who had solicited him what his answer should be, and that he said in effect: "Since you can see all right, the answer should be 'No.' "

The plaintiff contends that his answer was not a warranty, but a representation not material to the risk of insurance, and, further, that, the soliciting member knowing the condition of plaintiff's sight, and having suggested the answer, defendant is estopped to deny its liability.

The trial court, at the conclusion of all of the evidence, sustained the motion of defendant for a directed verdict.

Six assignments of error are relied upon by plaintiff, but we think it only necessary to consider whether the trial court erred in sustaining defendant's motion for a directed verdict.

It is admitted that the answer made by the plaintiff in response to the question, "Is your eyesight impaired?" was false and known to be by the plaintiff when he made it. Therefore, whether such answer was a warranty or a representation, if it was material to the risk and the policy would not have been issued had the plaintiff stated the truth as to his sight, the plaintiff cannot recover unless the defendant is precluded from claiming nonliability because of knowledge the soliciting member had concerning plaintiff's sight.

It is definitely settled by this court, through a long line of cases, that, in determining whether statements made in an application for insurance are warranties or representations, the court will take into consideration the situation of the parties, the subject-matter, and the language employed, and will consider a statement made to be a warranty only when it clearly appears that such was the intention of the contracting parties. *Aetna Ins. Co. v. Simmons*, 49 Neb. 811; *Kettenbach v. Omaha Life Ass'n*, 49 Neb. 842. It is equally well settled as the law of this state that a distinction is recognized between questions in an

application which call for statements of conclusions of fact not expressly within the knowledge of the applicant, and in regard to which the insurance company has equal means of ascertaining for itself the truth, and, on the other hand, questions which call for information regarding facts necessarily and peculiarly within the knowledge of the applicant. It is held that an incorrect or untrue answer in an application for life insurance in reference to matters of opinion will not void a policy, but that an untrue answer in an application for life insurance as to matters which are peculiarly within the knowledge of the applicant, and material to the risk, will void the policy. *Royal Neighbors of America v. Wallace,* 73 Neb. 409; *Swanback v. Sovereign Camp, W. O. W.,* 103 Neb. 34; *Seal v. Farmers & Merchants Ins. Co.,* 59 Neb. 253; *Muhlbach v. Illinois Bankers Life Ass'n,* 108 Neb. 146. That the information sought to be obtained by the answer to the question was peculiarly within the knowledge of the plaintiff is scarcely open to discussion. He has admitted that he had been afflicted with traumatic cataract of the left eye for many years, that the sight was destroyed, in effect; and that he had repeatedly been advised by medical experts to submit to an operation for the restoration of the sight of his left eye. It is contended by the defendant that it was its policy not to issue certificates of membership to applicants afflicted as plaintiff was, and that it would not have issued the certificate in question had his answer disclosed the true condition of the sight of his eye. The evidence amply sustains this, and the trial court correctly held that the answer was not a mere representation, but a warranty material to the risk of insurance, wholly untrue and known to be such by the plaintiff when he made it.

It remains to consider whether the knowledge of the member who solicited the plaintiff was imputed to the defendant association. The only evidence in the record as to the conversation between the plaintiff and Shepard, soliciting member, is found in the testimony of the plaintiff. It appears that Shepard was drowned a few weeks

after the issuance of the certificate of membership to the plaintiff. The plaintiff's testimony is as follows: "When I come to the line where it says, 'Is your eyesight impaired?' I says, 'What does that mean?' He says, 'You can see all right, can't you?' I said, 'Yes.' And he said, 'Put no there.' "

Our attention is called to the following cases in support of plaintiff's contention that where the agent had full knowledge of the facts the company is estopped to assert that the answers made are untrue. *Home Fire Ins. Co. v. Fallon,* 45 Neb. 554; *German Ins. Co. v. Frederick,* 57 Neb. 538; *Busboom v. Capital Fire Ins. Co.,* 111 Neb. 855. It will be noted that in these cases the application was prepared by the agent to whom the facts had been truthfully stated by the insured, and that through fraud, mistake or negligence of the company's agent the facts had been concealed or misstated to the company by no misconduct of the insured. None of these cases can be made to apply to the facts in this case. Here the application was prepared by the insured, he knew what the facts were, and wilfully misstated them in his application.

It is not necessary to discuss extensively whether the member who solicited the plaintiff to join the association was its agent in the sense that information possessed by him was imputed to the association. The rule that the agent is presumed to have communicated all information possessed by him to the association is for the protection of applicants who act in good faith and have not knowingly misstated facts material to the risk of insurance. Knowing, as he must have, that the member-solicitor desired that the true condition of plaintiff's sight should not be revealed to defendant by a truthful answer, plaintiff had no reason to assume that Shepard would communicate information to the association that would discredit plaintiff's application. The law is well stated in the following cases: *Priest v. Kansas City Life Ins. Co.,* 116 Kan. 421: "There is some difference of opinion whether an insurance company is chargeable with knowledge of an appli-

cant's condition obtained by its * * * soliciting agent. But, assuming the imputed knowledge rule to apply to them as well as to other agents, it does not extend to cases where answers are given by the applicant which he and the agent both know to be false."

Bratley v. Brotherhood of American Yoemen, 159 Minn. 14: "It is urged that, as the deputy knew of the falsity, his knowledge was the knowledge of the company. * * * We cannot hold that the insurer is bound by statements contained in an application when not only the agent, but the assured, knows they are untrue, and the application is to be forwarded to the insurer as the basis of the contract."

McCormack v. Security Mutual Life Ins. Co., 220 N. Y. 447: "The law of imputed knowledge has its basis in the presumption that the agent will perform his duty. The presumption is not available for the protection of a wrongdoer who has no reason to expect, and did not intend that there should be, a revelation of the truth."

The question in the instant case called for a statement of fact material to the risk, and not for an opinion. Through collusion between the plaintiff and the soliciting member of the association, an untruthful answer was made to the defendant association by the plaintiff in an application prepared by himself. The member of the association knew of the falsity of the answer made by plaintiff, and plaintiff likewise knew that the member knew of the untruthfulness of the answer that plaintiff had made. In consequence of such collusion between the plaintiff and the member of said association, plaintiff was admitted to membership therein and procured insurance. Had a truthful answer been made by plaintiff, the policy or certificate of membership would not have been issued.

To hold in such circumstances that the association is estopped to deny liability because Shepard, soliciting member, knew that plaintiff had misinformed the defendant association as to the condition of his sight would be to reward wrong-doing, encourage fraud and collusion between

members of an association and those making application for insurance, and put the association at the mercy of unscrupulous agents and applicants.

The trial court properly sustained defendant's motion for a directed verdict, and its judgment is

AFFIRMED.

NELLIE A. DREAMER, EXECUTRIX, APPELLEE, V. VITA OBERLANDER, APPELLANT.

FILED JANUARY 22, 1932. No. 28058.

Husband and Wife: LIABILITY OF WIFE FOR NECESSARIES. Section 42-201, Comp. St. 1929, relating to the wife's separate property, makes the property of a married woman liable for debts contracted for necessaries furnished the family, but no personal liability is thereby imposed upon her. Where no property exists, no liability can arise under the statute.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

C. C. Flansburg, for appellant.

Skiles & Skiles, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and WRIGHT, District Judge.

WRIGHT, District Judge.

Action brought and judgment entered against appellant, a married woman, on a debt for necessaries of life, contracted by her husband.

The petition alleges a sale and delivery to the husband of groceries and meat; that the same were necessaries furnished to the family of appellant and her husband; that judgment had been recovered against the husband for the indebtedness, upon which execution had issued and returned unsatisfied for want of property whereon to levy and make the same, and the amount of said judgment, with interest and costs, was due from appellant, the wife, for necessaries of life. There was no allegation as to any

property or separate estate of the wife. The prayer was for judgment against the wife for necessaries of life in the amount alleged to be due, and costs.

Appellant answered, admitting the judgment against her husband for necessaries furnished her family; the amount due; that execution had issued thereon and been returned unsatisfied for want of property whereon to levy or make the same; that during the times mentioned her husband and she were and still are married and living together as husband and wife; denying that she contracted the debt, and alleging that, at the time the debt was contracted and at the time the judgment was obtained, she had no separate business, property or estate; that she is still a married woman and has no separate estate or property and has no personal liability on her part for her husband's debts.

To this answer a demurrer was sustained. Appellant elected to stand on her answer. Judgment was entered against her, from which she has appealed.

The question presented is the liability of a married woman for a debt contracted by the husband for necessaries furnished the family of the husband and wife where, under the admitted facts, the wife, at the time the debt was contracted and at the time the suit was commenced, had no separate property or estate. No claim can arise by reason of any contract with the wife, but the liability, if any, must rest solely on the provisions of the statute relating to separate property and the liability of a married woman, section 42-201, Comp. St. 1929, which is as follows:

"The property, real and personal, which any woman in the state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property, which shall come to her by descent, devise, or the gift of any person except her husband, or which she shall acquire by purchase or otherwise, shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband, or liable for his debts; Provided, all prop-

erty of a married woman not exempt by law from sale on execution or attachment, shall be liable for the payment of all debts contracted for necessaries furnished the family of said married woman after execution against the husband for such indebtedness has been returned unsatisfied for want of goods and chattels, lands and tenements whereon to levy and make the same."

The question finally turns upon a consideration of whether the statute imposes a personal liability upon the wife. Appellant insists that no personal liability is created; that when the estate does not exist the liability cannot arise, and that the proceedings under the statute are *in rem* rather than *in personam*. Appellee, on the other hand, contends that the statute imposes upon the wife a personal liability for the indebtedness, and not merely a charge upon her property, to be enforced by proceedings *in rem*.

Appellee calls our attention to the rule adopted in Illinois, Iowa, Colorado, Utah, Washington, and Oregon, to the effect that the liability imposed is personal under their respective statutes fixing the liability of married women for necessities. An examination of the statutes of these several states discloses that they are almost, if not quite, identical. That of Illinois reads: "The expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife, or either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately." Callaghan's Ill. St. Ann. ch. 68, sec. 15. The reason for the rule holding the wife personally liable under such a statute is well given in *Hayden v. Rogers*, 22 Ill. App. 557, where that court, in holding personal liability in the wife, argued:

"Independent of its provisions the husband is personally liable for indebtedness incurred for the expenses of the family, and the statute, by providing that the wife may be sued jointly with him in respect to such indebtedness, necessarily imposes upon her a liability precisely

commensurate with his. The liability, therefore, imposed upon her, is necessarily a personal liability, for upon no other principle can effect be given to this provision of the statute."

The supreme court of Alabama, in *Pippin v. Jones*, 52 Ala. 161, in construing a statute of that state providing that for articles of family supply or used in the family, which are suitable to the estate and condition in life of the family of such husband and wife, and for which the husband would, by the common law, be liable, the husband shall be severally and the husband and wife jointly liable and suable at law, and making the wife's separate estate liable for such debts, said:

"As to the wife, the suit at law is rather a proceeding *in rem* than *in personam*. The judgment rendered, as to her, ascertains and concludes no fact except that she has a separate estate, subject to its satisfaction. It is of consequence a rule of pleading, that to support the proceeding, the existence of this estate must be averred, and that it may be known on what the judgment is to operate, it must be described. The separate estate being an indispensable element of the proceeding, it must exist when the contract is made, out of which its liability arises; and its existence must continue to the institution of the suit. If when the contract is made, the estate does not exist, the liability cannot arise; and if it is exhausted or from any cause ceases to exist before institution of suit, there would be no foundation for a judgment as to the wife."

And again, in *Henry v. Hickman*, 22 Ala. 685, that court, in construing the statute, say:

"We cannot suppose that this act intended to create a liability in all cases against the wife, jointly with her husband, for supplies furnished to the family. It is applicable only to specific cases, to wit, where the wife has a separate estate."

Our legislature seemed content to provide merely that the property of a married woman shall be liable for the payment of all debts contracted for necessaries furnished

the family. The statute in no uncertain terms provides that the property of the wife, both real and personal, whenever and however acquired, shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband *or liable* for his debts, with the exception, by way of proviso, that her property not exempt by law from sale on execution or attachment shall be liable for the payment of debts contracted for necessaries furnished the family of such wife, after execution against the husband for such indebtedness has been returned unsatisfied for want of property whereon to levy and make the same. No provision is made for joint and several liability, or for suit jointly or severally, but express provision is made that her property may be liable for the debt only after it shall have been established that the husband has no property whereon to make the same. This court, in *Dietz Lumber Co. v. Anderson,* 116 Neb. 205, has already determined that the statute does not create a personal liability; and in construing it took occasion to say:

"It will be noted that the statute in question renders the property of a married woman liable for debts contracted for necessaries of life for the family and is not a personal liability imposed upon her."

Having adopted this construction it would seem unwise to vacillate, for safety lies in an adherence to rules once established; moreover, we see no other construction which could reasonably be placed upon the statute.

Our attention has been directed to *George v. Edney,* 36 Neb. 604, and *Small v. Sandall,* 48 Neb. 318, where it is stated that the wife is made surety for the husband for the payment of necessaries furnished the family. In neither of these cases was the court called upon to construe the statute in the particulars here presented. To construe the expressions used in these cases as a determination by this court that the statute not only made the property of a married woman liable for necessaries furnished the family, but also created a personal liability as

well, would, it seems, amount to judicial legislation, which we do not think was intended.

Under the facts as admitted, there can be no personal judgment against the appellant for the debt of her husband. It is only her property which is liable. It being admitted that when the debt was contracted and when this action was commenced she had no estate or property of any kind from which the judgment or any part of it could be satisfied, it follows that the action became a useless gesture. No estate exists, therefore no liability can arise under the statute.

It is the accepted rule of this court that the statute creates no personal liability. The petition failed to disclose any property of the wife and the answer alleges no such property. The demurrer should have been overruled.

For the reasons stated, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

WILLIAM BARTELS, APPELLANT, V. DRAINAGE DISTRICT NO. 2, DAKOTA COUNTY, APPELLEE.

FILED JANUARY 28, 1932. No. 28041.

Drains: ACTION FOR DAMAGES: PETITION: SUFFICIENCY. The provisions of section 31-551, Comp. St. 1929, construed and *held*: First, to require claimant of damages arising out of the negligent construction or maintenance of works by drainage districts organized under the laws of the state of Nebraska to file with the secretary of the board of directors thereof within the time in such statute prescribed an actual notice in writing covering the information therein required; second, that in an action against such a drainage district for damages so occasioned, when the petition does not show the filing of the written statement complying with the provisions of the statute, such petition fails to state a cause of action.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Affirmed.*

Gill & Gill and *George W. Leamer,* for appellant.

William P. Warner, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and WRIGHT, District Judge.

PER CURIAM.

This is an action brought by a landowner against the defendant, a drainage district organized under the laws of the state of Nebraska, for damages occasioned by flood waters caused by the negligent construction and maintenance of the defendant's drainage ditch through the lands of plaintiff. The petition alleges that the damages sued for were suffered in 1927 and in 1928. But compliance with the requirements of section 31-551, Comp. St. 1929, is not alleged. It is indeed conceded in argument that no "actual notice in writing," as required by this section, was ever given by the plaintiff in this action. It also appears that several months elapsed after the infliction of the damages before this action was instituted.

A general demurrer to the petition on the ground that it failed to state facts sufficient to constitute a cause of action was sustained by the court, on the theory that the statute referred to requires the service of such a notice in the present case as a condition precedent to its maintenance. The plaintiff electing to stand on his amended petition, the proceedings were dismissed by the trial court. From this order plaintiff appeals.

The section referred to was enacted by the legislature of 1925 and constitutes chapter 127, Laws 1925. It carries as a title: "An act relating to drainage districts; to provide for the giving of written, detailed notice by claimant to drainage districts organized under the laws of Nebraska, covering damages to such claimants or their property, arising out of defects in the construction or maintenance of the districts' work and for the keeping of a record of such notice by the respective secretaries of said districts." Section 1 thereof provides in part: "That no drainage district organized under the laws of

Nebraska shall be liable for damages arising out of the construction or maintenance of any of the said districts' work unless actual notice in writing (here is set forth the statutory requirements of the same) shall be proved to have been filed with the secretary of the board of directors of said district, within thirty (30) days after the occurrence of such accident or injury, except in cases involving minors." It is conceded that the exception referred to in the words of the statute has no application in the present case. The meaning of this statute, construed as an entirety, especially when read in connection with its title, is plain. Its application to the subject-matter involved in this action is mandatory. It contemplates that "no drainage district organized under the laws of Nebraska shall be liable for damages arising out of the construction or maintenance of any of the said districts' work" unless and until the notice in writing prescribed by the terms of the statute is filed with the officer therein named. Compliance with its provisions is, therefore, a condition precedent to bringing and maintaining an action for damages under the conditions set forth therein. *Nothdurft v. City of Lincoln*, 75 Neb. 76; *City of Lincoln v. Finkle*, 41 Neb. 575; *City of Lincoln v. Grant*, 38 Neb. 369; *City of Hastings v. Foxworthy*, 45 Neb. 676; *Schmidt v. City of Fremont*, 70 Neb. 577; *McCollum v. City of South Omaha*, 84 Neb. 413; *Swaney v. Gage County*, 64 Neb. 627; *Bryant v. Dakota County*, 53 Neb. 755. In failing to embrace this necessary allegation, the petition demurred to failed to state a cause of action, and the trial court rightfully sustained the demurrer thereto.

It follows that the action of the trial court in dismissing the proceedings is correct, and the judgment is

AFFIRMED.

MARGARETHE OSTHERTHUM, APPELLANT, V. JOHN OSTHERTHUM ET AL., APPELLEES.

FILED JANUARY 28, 1932. No. 28117.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Wilmer B. Comstock and *John H. Comstock,* for appellant.

Max V. Beghtol, Glen H. Foe and *J. Lee Rankin, contra.*

Heard before GOSS, C. J., EBERLY and PAINE, JJ., and BEGLEY and ELDRED, District Judges.

PER CURIAM.

This is a suit in equity in which plaintiff, appellant, seeks to set aside, on the ground of fraud and undue influence, a deed made by her to her son, whose wife is joined as the other defendant.

Plaintiff, with her husband, John F. Ostherthum, and their two daughters and one son, came here from Germany in 1883. They settled near where Hallam in Lancaster county is now located. The son, John, who will be called the defendant, was then about eighteen years old. The next year the father bought the eighty acres involved here and took title to it. It has continually been owned by some member of the family. The father was not able to do much farm work. Defendant operated the farm and lived there not only during the remainder of his minority but until he was 28, when he married. Soon after that he purchased a farm nearby and has lived thereon, but has continued to operate the home place either as tenant or owner. Plaintiff continued to live there until May, 1928, when she fell and fractured her hip. She was brought to a Lincoln hospital, where she remained about ten weeks. Since that she has lived with her daughter, Helena Stover, whose home is near the hospital. Plaintiff is about 88 years old and is almost helpless. She is well cared for by her daughter, who has had experience as a practical nurse.

The father died in 1907, leaving the eighty acres to defendant by will which was duly probated, but the defendant, joined by his wife, quitclaimed the land to his mother before the estate was closed. He thereupon continued to farm the land as tenant until March 30, 1927, when plaintiff reconveyed it to him, reserving during her life one-third of the crops raised on the premises. It is this deed which plaintiff asks to have set aside.

When plaintiff went to the hospital she had a considerable sum—probably in excess of $2,000—in the bank. The hospital and medical expenses and what she had paid out for care since her removal to the home of her daughter had exhausted her resources before the case was tried, except that, assuming the deed to be allowed to stand, she owns whatever is derivable from her crop interest in the land. Some at least of that has been paid, as indicated by the evidence. This is not an action to require an accounting, and we mention the items in this paragraph merely to show its connection with her testimony. She testified, by deposition, that she was a cripple, helpless, cannot earn anything and must have the farm back. Defendant testified that he never asked his mother to deed the farm to him; and she testified: "John didn't ask me directly to give him a deed but I gave him the deed, but I wanted to have peace." When she was asked what she meant by that expression, she answered: "So he couldn't say he wouldn't get anything afterwards, so he couldn't keep representing to me that he wouldn't get anything afterwards." Several times she stated in her testimony that she made the deed to defendant because she wanted peace. Plaintiff's argument is that she wanted peace from the importunities of her son. Defendant's argument is that she wanted peace of mind because she wished to be just, and because of the demands of her daughter hereinafter set forth.

Reinhard Schaad, a neighbor, called on plaintiff the day before she made the deed. She told him Mrs. Stover had been there that week and was dissatisfied because of a

will plaintiff had made and that the daughter demanded as much as John. Plaintiff detailed how the son had stayed at home, worked like a slave while the girls had left home, how her husband's will had left the farm to the son, and that John ought to have the eighty acres. She asked the witness to see the son and tell him she wanted to go to Hallam the next morning and fix the matter up. He conveyed the message; the defendant took the plaintiff to Mr. Carsten at Hallam; Mr. Carsten drew the deed that day and she executed it.

Mr. Carsten testified that she had consulted him about the matter about two weeks earlier and he had advised her to think it over thoroughly before making the deed. She informed him she wanted to make out the papers she had talked about to him previously. He made out the deed, read it to her, asked her if it was of her own free will and accord; she answered in the affirmative, executed the deed, and after it was acknowledged and fully completed she handed it to defendant. That is the deed involved here.

The burden is on the plaintiff to prove the allegations of her petition. There is no presumption of fraud or undue influence so controlling the will of a grantor as to avoid his deed. Facts constituting such fraud or influence must be proved by a preponderance of the evidence.

Our foregoing statement of the evidence is but a brief abstract but fairly indicates its gist. We have read it and are of the opinion that the evidence fails to sustain the burden laid on plaintiff. The judgment of the district court is

AFFIRMED.

STATE CREDIT COMPANY, APPELLEE, V. NATIONAL OLD LINE LIFE INSURANCE COMPANY, APPELLANT.

FILED JANUARY 28, 1932. No. 28021.

Insurance: RIGHTS OF MORTGAGEE AS INSURER. A mortgagee who for his own benefit applied for fire insurance on the mortgaged

chattel, disclosed the facts essential to underwriting, paid the premium and procured and retained a policy, all without the knowledge of the mortgagor, may, in a proper case, recover a loss in his own name under a mortgage clause making the loss payable to him as his interest may appear at the time of the loss, though mortgagor was named in the policy as insured and parted with title to and possession of the insured property before it was burned.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Chambers & Holland, for appellant.

Perry, Van Pelt & Marti, contra.

Heard before ROSE, GOOD, DAY and PAINE, JJ., and LESLIE, District Judge.

ROSE, J.

This is an action on an insurance policy to recover a loss caused by the burning of an automobile.

To secure a note, Helen I. Hayes mortgaged the automobile December 17, 1928, for $1,524. State Credit Company, plaintiff, purchased and owned the chattel mortgage upon which it claimed, as mortgagee, a lien for a balance of $857.25, the sum for which judgment was demanded under the insurance policy. The insurance risk was $1,700 for one year beginning December 22, 1928. Plaintiff, the mortgagee, applied for the insurance and paid the premium which was $16.15. Helen I. Hayes, mortgagor, was the person named in the body of the policy as insured. Attached to the policy when issued was a mortgage clause providing:

"It is hereby understood and agreed that loss, if any under this policy, shall be payable to Mrs. Helen I. Hayes and State Credit Co. as their interest may appear at the time of loss."

The automobile was destroyed by fire October 15, 1929. The National Old Line Life Insurance Company, under a former name, issued the policy as insurer. The defendants were insurer and Helen I. Hayes. The latter did not plead and default was entered against her.

The insurer admitted that it issued the policy, but interposed the defense that it was not in force at the time of the fire, alleging in substance that the insurance previously expired under the terms of the policy; that Helen I. Hayes, the insured mortgagor, had parted with title to and possession of the insured automobile; that a change in the ownership of the property had avoided the insurance, terminated the risk assumed, and relieved insurer from liability; that at the time of the loss insured had no insurable interest in the automobile; that the right of plaintiff, the mortgagee, to insurance expired with that of mortgagor. The facts pleaded as defenses were put in issue by a reply.

At the close of the testimony each litigant requested a peremptory instruction. The district court directed a verdict in favor of plaintiff for $622.95. From judgment on a verdict therefor defendant appealed.

Assuming that Helen I. Hayes, mortgagor, who was named in the body of the policy as the insured, had parted with her title to and possession of the insured property and consequently, under the terms of the insurance contract, had no interest in or insurance on the automobile when it was destroyed, the question presented by the appeal is the liability of insurer to plaintiff for the loss caused by the fire at that time.

The policy did not contain a union mortgage clause to the effect that a loss payable to mortgagee should not be avoided by any act or neglect of mortgagor or owner of the insured property. In absence of such a clause insurer contends that the trial court erred in directing a verdict in favor of plaintiff and that the judgment below should be reversed under the following principle of law as it appears in the brief of insurer: "Under a simple loss-payable or open-mortgage clause in a policy of insurance issued to the mortgagor, and payable to the mortgagee as his interest may appear, the mortgagee is simply an appointee of the insurance fund, whose right of recovery is no greater than the right of the mortgagor, so that a

breach of the conditions of the policy by the mortgagor, which would prevent recovery by him, precludes recovery from the insurer by the mortgagee."

In support of this proposition reference is made to many cases, including *Antes v. State Ins. Co.*, 61 Neb. 55. The rule quoted is recognized in Nebraska and in many other jurisdictions and is sound in principle, but in the cases generally in which it has been applied the insured mortgagor paid for the insurance and procured the policy for his own protection. Decisions in some cases, however, distinguish cases applying the general rule, or recognize an exception thereto, where a mortgagee for his own benefit applies directly to the insurer for insurance, pays the premium, and receives a policy containing a mortgage clause for the protection of mortgagee. On this subject the supreme court of Illinois ruled as follows:

"Where a party contracts for the insurance of property, pays the premium, and the policy makes the loss payable to him, the agreement to pay the loss is a contract with the person who pays the consideration, and he will have a right of action in his own name, although the insurance is in the name of another." *Traders' Ins. Co. v. Pacaud*, 150 Ill. 245. See, also, *Lubetsky v. Standard Fire Ins. Co.*, 217 Mich. 654; *Houran v. Aetna Ins. Co.*, 183 Mich. 418; *Connecticut Mutual Life Ins. Co. v. Luchs*, 108 U. S. 498; 2 Cooley, Briefs on Insurance (2d ed.) 1287.

The same view seems to have been taken in *Liverpool & London & Globe Ins. Co. v. Davis*, 56 Neb. 684. An ordinary loss-payable mortgage clause may, under some circumstances, create between insurer and mortgagee an independent insurance contract not forfeitable by acts of mortgagor in conveying or further incumbering the insured property. The general rule and the exception or different rule may be consistently enforced in the same jurisdiction where the facts show the necessary distinction.

In the case at bar the evidence tends to prove the following facts: In a conversation between the president of the State Credit Company, plaintiff, and insurer's man-

aging officer, the latter said he would issue insurance policies to cover notes and mortgages purchased by the former. Without consulting mortgagor, and in her absence, plaintiff as mortgagee, having an insurable interest in the automobile, made the application for insurance, disclosed the facts essential to underwriting, paid the premium and received and retained the policy. Insurer did not return or tender back the premium or any part of it at any time. Mortgagor never paid plaintiff any part of the cost of the insurance. The policy was delivered to plaintiff, mortgagee, and, when issued, there was attached to it the mortgage clause making the loss payable to insured and plaintiff, naming them, "as their interest may appear at the time of loss." The interest of plaintiff at that time, or the value of the automobile with interest from the date upon which the petition was filed, was $622.95. The balance due on the note and mortgage was $857.25. Mortgagor had no interest in the automobile when burned. There was no fraud or bad faith in the procuring of the insurance. Plaintiff reduced the amount of the lien by collecting payments on the note and mortgage and did nothing to increase the hazard of insurer.

The mortgage clause, in connection with the policy as a whole, with the negotiations for insurance protecting the interest of mortgagee in the insured property, with the payment and retention of the premium, with the delivery of the policy directly to mortgagee and the latter's retention thereof and with all other surrounding circumstances, evidences an independent contract between insurer and mortgagee. They were the contracting parties. The consideration passed directly from mortgagee to insurer. Under the insurance contract mortgagee was individually insured and its contractual rights for which it paid the consideration retained by insurer were not forfeited or terminated because the name of mortgagor was by the insurer inserted in the body of the policy as the insured or because the policy lapsed as to her. Conditions terminating the insurance in the event of a transfer of

title or of an additional lien apply to mortgagor, the owner who had power to sell or incumber the property, not mortgagee. The mutual intention of insurer and mortgagee to enter into an independent contract insuring the latter's interest in the automobile is shown by their executed writings in the light of surrounding circumstances, and consequently plaintiff was not required to resort to equity for a decree reforming the policy by inserting therein the name of plaintiff as the insured to the extent of its interest as mortgagee. By request of each litigant for a peremptory instruction the issues of law and fact were submitted to the trial court for determination. The jury were properly directed to render a verdict in favor of plaintiff. Prejudicial error has not been found in the record.

AFFIRMED.

FARMERS STATE BANK OF ST. EDWARD, APPELLANT, V. FRANK P. FLAHERTY, APPELLEE.

FILED JANUARY 28, 1932. No. 28108.

Evidence examined, and *held* to sustain the verdict.

APPEAL from the district court for Nance county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

F. C. Radke, Barlow Nye and *George W. Wertz,* for appellant.

J. R. Shields and *Wagner & Wagner, contra.*

Heard before ROSE, DEAN, GOOD and DAY, JJ., and THOMSEN, District Judge.

GOOD, J.

This action was begun in the name of the Farmers State Bank of St. Edward on a promissory note in which it was named as payee, and which was signed by the defendant as maker. The bank was insolvent at the time the action was brought. Later, the receiver of the bank was substi-

tuted as plaintiff. Defendant answered, admitting the execution of the note, and alleged that it was given as an accommodation to the bank and without consideration. A trial resulted in a verdict and judgment thereon for defendant. Plaintiff has appealed.

Plaintiff contends that the verdict is contrary to the evidence, and, further, that if the note was without consideration it was given for the purpose of deceiving the bank examiner and state banking authorities, and was a fraud upon the then existing and prospective depositors and creditors of the bank.

On several points the evidence is in sharp and irreconcilable conflict. The finding of the jury for defendant on conflicting evidence compels this court to take the view of the evidence most favorable to defendant. There is evidence tending to support the contention of plaintiff that the note was given for a valuable consideration, but the evidence of the defendant is to the effect that in September, 1926, he gave a note for $5,900 to the bank, without any consideration whatever and purely as an accommodation to the bank; that this note was twice renewed without the payment by him of any interest and without his receiving any consideration for either renewal. The second renewal note is the one in controversy in this action.

It would serve no useful purpose to set out in this opinion a résumé of the evidence. Suffice it to say that there is ample evidence in the record to sustain the finding that the note was given as an accommodation and without consideration.

Plaintiff contends that even if the note was without consideration it was given in pursuance of a fraudulent design and scheme between the defendant and the then cashier of the bank, to make it appear that the bank was solvent and in a sound condition, when, in fact, it was not, and that this worked a fraud upon the then existing and prospective depositors and creditors of the bank. The evidence discloses that at the time the original note was

given the bank was a going concern and, so far as appears, was entirely sound. It is true that it was represented that the bank desired additional money and preferred raising it by use of accommodation paper, rather than enforce payment on obligations due the bank from farmers of the vicinity who had suffered loss of crops; but there is nothing to disclose that the bank was in an unsound condition either at the time of the original note or of its first renewal. The second renewal, being the note in question, was executed after banking hours on the same day that the bank finally closed its doors. The banking authorities could not have been deceived by the execution of this renewal; nor could any creditor of the bank been injured thereby.

The facts disclosed by the record fail to support the contention of plaintiff that the note was executed for the purpose of deceiving the state banking authorities, or of working a fraud upon the creditors of the bank; or that it did, in fact, deceive the state banking authorities or work any injury to any creditor of the bank.

The record appears to be free from error. Judgment

AFFIRMED.

IN RE ESTATE OF NIELS THOMAS SMITH.
GERHART J. SMITH ET AL., APPELLEES, V. SCENA M. CHRISTENSEN, APPELLANT: MARY SMITH ET AL., APPELLEES.

FILED JANUARY 28, 1932. NOS. 27987, 27988.

Wills. A provision in a will that the share of a daughter in her father's estate shall be held in trust, and only the income thereof paid to her during the lifetime of her present husband, is *held* to be a valid restriction.

APPEAL from the district court for Kearney county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

F. L. Carrico, for appellant.

King & Bracken and *Carl T. Curtis, contra.*

Heard before ROSE, GOOD, DAY and PAINE, JJ., and LESLIE, District Judge.

PAINE, J.

These two actions each grew out of handling the estate of Niels Thomas Smith, and each depends somewhat upon the fourth paragraph of his will. Case No. 27987 was an action in partition, brought by two adult sons for the partition of the property owned by their father, Niels Thomas Smith, in which Scena M. Christensen, a daughter, filed an answer, praying that the fourth paragraph of the will of her father be declared void, and that she be declared the owner in fee simple of her share of said property. The district court entered a decree confirming the shares of the various heirs, and found against the defendant, Scena M. Christensen, finding that the fourth paragraph of the will was not void, and that she had no title in fee simple except as provided in said will, and directing partition of the property, and appointing G. L. Godfrey to partition said property, who gave bond, as required by law; and thereupon the case was brought to this court on appeal.

In case No. 27988, Scena M. Christensen filed objections to the distribution of the property under the will of Niels Thomas Smith, which had been duly admitted to probate, and prayed that her share of her father's property be paid to her absolutely, and that no part be held by a trustee, and that the paragraph in the will directing the holding of said property by trustee was illegal. Upon an adverse finding by the county judge, appeal was taken to the district court, and an order entered by the district court affirming the action of the county judge and dismissing the objections of Scena M. Christensen, and supersedeas was fixed in the sum of $200. Carl T. Curtis, guardian *ad litem,* files his brief as an appellee.

Niels Thomas Smith was a thrifty farmer in Kearney county, Nebraska, who accumulated real and personal property of the value of about $50,000, and left eleven adult children and the minor heirs of one deceased child.

At the time of his death on November 2, 1929, he left a will, which was executed by him on November 9, 1928, before M. D. King and B. H. Bracken as witnesses, and the determination of each of these cases rests upon the construction of the fourth paragraph in said will, reading as follows: "Fourth. I give, devise and bequeath to my daughter Scena M. Christensen the same share of my estate that she would receive according to law if I died intestate. Provided that her share shall be held in trust for her and the income only paid to her during the lifetime of her present husband. Upon the death of her husband during her life said share shall then become hers in fee simple and be assigned and paid to her at once. Provided further that if she shall die before her present husband her share shall then go to her children in equal shares. Provided further that said children shall not receive their share until they shall attain the age of 25 years but the same shall be held in trust for them and paid to them upon attaining such age the same as provided in the second paragraph hereof for the children of my daughter Petrea Spors. Provided further should any of these children die before he or she reaches the age of 25 years, then his or her share as the case may be shall belong to and be paid to the survivors in equal shares. This trust shall be executed in the same manner and by the same trustee appointed in accordance with paragraph two hereof."

That part of paragraph 2 of the will affecting trustees reads as follows: "I direct that the court in which this will is probated shall appoint a proper person trustee and require him to give bond in such proper sum as the court may direct and require him to report to the court his acts and doings in the execution of said trust."

It is contended by appellant that a condition in a will which discourages or interferes with the marital relation existing is void as against public policy. To support this contention, we are cited to *Weathersby v. Weathersby*, 13 Smedes & Marsh. (Miss.) 685; *Cruger v. Phelps*, 47 N. Y. Supp. 61; *Witherspoon v. Brokaw*, 85 Mo. App. 169; *Con-*

rad v. Long, 33 Mich. 78; *Hawke v. Euyart*, 30 Neb. 149, 27 Am. St. Rep. 391; *O'Brien v. Barkley*, 28 N. Y. Supp. 1049.

The first case cited above was decided by Justice Clayton at the January term, 1850, in Mississippi. The trust condition for the benefit of slaves, falling under the inhibition of the law, was defeated, but the son, Ludovick Weathersby, was invested with the absolute title to the slaves.

In the case of *Cruger v. Phelps, supra,* the action involved a contested provision in the will, which provided that the daughter, whose husband resided in New York, forfeited her right to the income of the residuary estate in case she traveled or resided outside the continent of Europe during her husband's life or until she was divorced from him. This provision was held void as against public policy and good morals.

In the case of *Witherspoon v. Brokaw, supra,* Mrs. Brokaw provided that one-half of her property should go to the daughter of her niece "so long as she shall be kept from the control and custody of her said father, and no longer." This provision was held to be void.

In *Conrad v. Long, supra,* the will of A. S. Conrad provided that one-half his property should pass to his sister upon condition that "she should conclude not to live with her present husband, Henry Long, as his wife," and such provision was held void as against public policy.

In *O'Brien v. Barkley, supra,* Robert Shaw made a generous bequest to his daughter, Eleanor Elizabeth, upon the express condition "that she do not, at any time after my decease, associate, cohabit, or live with one James O'Brien." The court held the provision void as against public policy.

In the Nebraska case of *Hawke v. Euyart, supra,* this court held that a certain devise, conditional upon the reformation of a wayward son, would be upheld. But another devise in the same will was held void. It appears from the record that this son had married a Mrs. Sadie Gladstone upon September 16, 1884, which fact was doubtless known to the testator at the time he added a codicil

and republished his will upon July 29, 1885, and this court held that in such a case a provision in the will that the funds should not be transferred until said son "has permanently freed himself from all influence, connections, associations, cohabitations and relations of every name, character, and description of and with a certain notorious and disreputable woman known by the name of Mrs. Sadie Gladstone, and with all relatives, friends and intimates of that woman," was a condition against public policy. It should be evident that the case at bar presents no such facts as *Hawke v. Euyart,* for the provisions herein are usual and ordinary, and carry out a valid purpose of the testator.

It is contended by the appellant that paragraph 4 interferes with the marital relation existing between Scena M. Christensen and her husband, and is void as against public policy, and that the trust sought to be established is so indefinite and uncertain as to powers and duties that it is impossible for a trustee to carry out the trust; yet we have examined with care the authorities cited, and have not found any one of them to hold to the doctrine that is contended for in this case. We do find that in the case entitled *Matter of Seaman,* 218 N. Y. 77, Ann. Cas. 1918B, 1138, it is held that, while conditions in restraint of marriage are void, yet a provision preventing the vesting of an estate absolute if she marries a certain individual, or, in any event, until his death, will not be held invalid as tending to excite her to cause his death, but will be held to be a valid restriction.

The appellees contend that similar provisions have been sustained by many courts, citing *Thayer v. Spear,* 58 Vt. 327; *Snorgrass v. Thomas,* 166 Mo. App. 603; *Daboll v. Moon,* 88 Conn. 387, Ann. Cas. 1917B, 164; *Shick v. Whitcomb,* 68 Neb. 784.

The bill of exceptions is very short, and it may be said that there is scarcely any question of fact that is in dispute in the case. The will provided that his property

should be divided between his children in equal shares, the same as though he had died intestate, and provides for a trustee retaining three of these shares until certain events take place.

This court fails to see wherein the provision objected to is void as against public policy, and is satisfied that the trustee, under the provisions for such reports of his acts and doings as the county judge may direct, can carefully handle and manage the property until these contingencies arise. The judgment of the district court in each of the above cases is hereby

AFFIRMED.

ELMER C. LOY, APPELLEE, V. STORZ ELECTRIC REFRIGERATION COMPANY, APPELLANT.

FILED JANUARY 28, 1932. No. 28065.

1. Trial: REMITTITUR. Where there is a controverted issue of fact and the findings of the jury, under the instructions of the court, warrant a recovery, it is error for the trial court to require the successful party to file a remittitur of such recovery.
2. Account Stated. A statement of account made out by one party and presented to another in the course of dealings had between the two must be expressly assented to by the latter party as to its correctness to make an account stated. A denial of the account, or a dispute as to its correctness, takes it out of the category of cases of an account stated.
3. Sales: CONTRACT: BREACH: MEASURE OF DAMAGES. The measure of damages on breach of an agreement for the sale and purchase of an article of personal property is the market price of such article on the day and place appointed for its delivery, less that part of the contract price not paid.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed in part, and reversed in part, and remanded, with directions.*

Howell, Tunison & Joyner, for appellant.

Lawrence I. Shaw, contra.

Heard before ROSE, GOOD and DAY, JJ., and FROST and MESSMORE, District Judges.

MESSMORE, District Judge.

This is an action wherein appellee, plaintiff below, sued appellant, defendant below, upon five causes of action growing out of appellee's employment by appellant as a salesman in Omaha.

The third and fourth causes of action set out in appellee's petition were abandoned by him in this court. The petition further alleges that on May 1, 1929, appellant, hereinafter called the company, employed appellee as a salesman and orally agreed to pay him a salary of $100 a month, plus 5 per cent. commission on his sales; that appellee worked under said contract until July 1, 1930, but was not paid his salary for the last half of June of that year, and praying for damages in the sum of $50 on his first cause of action.

His second cause of action is to the effect that about July 1, 1930, said oral contract of employment was canceled by mutual agreement of the parties, and appellee agreed, beginning July 1, 1930, to work on a strictly commission basis; that during July, 1930, he earned in commissions $183.40, but was paid only $100 thereof, and asks for damages in the sum of $83.40.

The fifth cause of action alleges that the company agreed to sell appellee, at wholesale price, a model G-100 electric refrigerator for $286; that appellee paid $275 of said price and was to pay the balance of $11 on delivery of said refrigerator to him; that the company has refused to deliver said refrigerator; that the retail value of the same is $475 and asks damages for said amount, less $11, leaving a balance due appellee on said cause of action of $464.

The company answered by denying all the allegations of the second amended petition, except such as were admitted; further, that it employed appellee as a salesman on a strictly commission basis of 12 per cent. on f. o. b. factory prices; agreed, as long as it was willing, to furnish appellee $100 a month, to be charged against his earn-

ings and to be repaid if the same exceeded his earnings; that it advanced appellee $2,096.40, and that his earned commissions were $1,568.20, leaving a balance due the company of $528.20; that appellee bought certain merchandise of the company, sold the same on his own account and turned part of the proceeds over to the company, for which he was credited with the sum of $320.19, leaving a net balance due the company of $208.01; that the company furnished appellee a true and correct statement of said account, that he accepted the same and agreed to pay it; that said account constituted an account stated; and the company prayed judgment against appellee for the sum of $208.01. On the trial, however, the company withdrew its request for judgment on its counterclaim in excess of the amount required to defeat appellee's causes of action and prayed for judgment for costs only.

Trial was had to a jury, which found for appellee, as prayed, on each of his five causes of action. Judgment was entered thereon. A motion for a new trial was filed and overruled on condition that appellee file a remittitur of all sums in excess of $464, the same being the amount claimed under his fifth cause of action, which remittitur was duly filed.

On appeal to this court we have for consideration appellee's recovery on his fifth cause of action, above set out, and appellee asks further, having abandoned his third and fourth causes of action in this court, that his recovery on the first and second causes of action be allowed and the remittitur of said causes of action filed in the lower court be held for naught.

The record discloses the identity of appellant company and the employment of appellee by the company; also his statement of the agreement that he was to receive $100 a month and 5 per cent. commissions on all sales as a salary, and any balance up to and including 12 per cent. of his commissions was to be paid to him as a bonus; that he was not paid for the last half of June, 1930, which left a balance of $50 due him. He was corroborated in this

testimony by the witness Davies, retail sales manager of the company; that said witness and one Nellor, vice-president and general manager of the company, had worked out a basis for the retail department whereby $75 or $100, whatever it might be, plus 5 per cent. was computed against 12 per cent., and if a man's total sales on a commission of 12 per cent. exceeded the amount he actually drew he was to receive the balance in cash as a bonus.

Appellee's exhibit 1, claimed to be an account of salary drawn in December, 1929, and received in evidence as an ultimate fact as to whether or not it was salary or something else, was testified to by one Freda Lohrberg, private secretary of Mr. A. C. Storz, president of the company.

Appellee's evidence disclosed further that he went on a strictly commission basis in July, 1930, and terminated his employment with the company in the latter part of said month. It was stipulated that his commissions from the sale of refrigeration machines during that month would entitle him to the sum of $183.40, $100 of said amount being paid appellee.

In reference to the purchase of the G-100 machine from the company, appellee testified that he agreed to purchase it from the company at a price of $286; that he sold his old machine, taking in payment therefor a contract for $250, which he turned over to the company, also receiving in payment of said machine a check for $25, which he indorsed over to the company; that he still owed the company $11 on the purchase price of the new machine; that said machine was not delivered to him by the company.

Contra to this testimony the company offered the testimony of Mr. Nellor, who, at the time of employment of appellee by the company, was its vice-president and general manager, to the effect that appellee was employed on a straight 12 per cent. commission basis and that $100 was paid him monthly as a drawing account; that said $100 was to be charged against his commissions for such period as the company was willing to do so. The company also introduced documentary evidence to show that appellee

was employed as a permanent salesman on a commission basis.

Several officers of the company testified to the account the company had with appellee in the course of its employment of him and the correctness of the account, which was substantially as stated in the counterclaim and set-off filed by the company. This account was denied by appellee. The company sought by evidence to show that there was no denial of the account on the part of appellee and that he accepted the same as true.

Appellant relies upon an account stated to defeat the claims of appellee and cites the cases of *Brewer v. Wright,* 25 Neb. 305, and *Jorgensen v. Kingsley,* 60 Neb. 44. In the latter case it was held that an account stated is merely an agreement between persons who have had previous transactions, fixing the amount due as the result of an accounting.

The general rule is that when parties have accounts against each other, and a statement of the account is made out by one party and presented to the other, and the latter expressly assents to its correctness, the law will regard it as a stated or settled account, and it will be binding on both parties. This rule was set out in an instruction of the trial court in the case of *Brewer v. Wright, supra,* which instruction was criticized by this court, but only to the extent that it might not apply to the case in which it was given; however, the instruction stated the general rule of an account stated in Nebraska.

In the instant case, while witnesses for the company stated that appellee agreed and assented to the account as stated by the company, there is a denial in the evidence of appellee on this point which takes this case out of the category of cases of an account stated; in other words, a dispute arises as to the correctness of this account.

In an account stated the person seeking to establish such an account may recover only by showing both the account and the unqualified assent of the other party thereto. *Sterling Lumber Co. v. Stinson,* 41 Neb. 368; *Cahill, Swift*

Mfg. Co. v. Morrissey Plumbing Co., 3 Neb. (Unof.) 865.

In the case of *Haish v. Dillon*, 71 Neb. 290, it was held that in stating an account, as in making any other agreement, the minds of the parties must meet, and the transaction must be understood by the parties as a final adjustment of the respective accounts between them and the amount due. In the instant case the minds of the parties did not meet on the alleged account and the transaction was denied, so then it was not understood. Every element of the account was presented to the jury in the counterclaim of the company, with the exception that $208.01, the sum formerly claimed due it from appellee in said counterclaim, was withdrawn from their consideration, and the counterclaim was left in the case in an amount required to defeat appellee's cause of action. The jury had the benefit of the claim made by the company and determined against it.

The company, for one of its assignments of error, complained of the misconduct of appellee's attorney in his argument to the jury. An examination of the record shows that the court informed the jury that they were not interested in the remarks of counsel, and under the admonition of the court we believe there is no prejudicial error in this respect.

The lower court, in ruling on the motion for a new trial, required appellee to file a remittitur of the amounts awarded him by the jury on his first four causes of action, which he did. Appellee abandoned his third and fourth causes of action in this court, which leaves the first and second causes of action upon which the remittitur is operative. Section 20-1929, Comp. St. 1929, provides: "That whenever the court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal said action, then the party remitting shall not be barred from maintaining that said remittitur should not have been required either in whole or in part." We are inclined to believe that the lower court erred in requiring appellee to file a remittitur of these causes of

action. There was sufficient evidence offered to sustain the findings of the jury on both the first and second causes of action, which were properly submitted to the jury.

The company cites as error the giving of instructions No. 6 and No. 8 which relate to the measure of damages for failure to deliver the G-100 electric refrigerator to appellee, and calls the court's attention to the fact that the wholesale price of the machine was $286 and that appellee was dealing with a wholesaler when he was dealing with the company.

It is held in almost every court of last resort in the Union that, where a breach of a contract consists of the failure of the seller to deliver goods, the measure of damages is ordinarily the difference between the contract price and the market price. The contract price in the instant case was $286 and the jury found the market price of the machine to be $475 on the day appointed for its delivery. Appellee was entitled to have the machine in question delivered to him. He had severed his connection with the company. It retained the machine. If he made a bargain, he was entitled to the fruits of his bargain.

In *Denver, T. & G. R. Co. v. Hutchins,* 31 Neb. 572, it was held that, where the seller of personal property fails and refuses to deliver the same to the buyer, the measure of damages for a breach of contract is the difference between the contract price and the market value of the property at the time and place where it should have been delivered.

Under the Uniform Sales Act, section 69-467, Comp. St. 1929, it is stated, in subdivision 3 of said section, in an action for failure to deliver goods: "Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of refusal to deliver."

From the foregoing we believe that the measure of damages in the instant case was correctly stated by the trial court and that the jury's verdict in that respect should not be disturbed.

Remanded, with instructions to enter judgment in favor of appellee on his first and second causes of action, the remittitur to stand as to his third and fourth causes of action, and affirmed as to the fifth cause of action.

AFFIRMED IN PART, AND REVERSED IN PART, AND REMANDED, WITH DIRECTIONS.

A. B. GORDON, APPELLEE, V. ROSAMOND CLARK, APPELLANT.

FILED JANUARY 28, 1932. No. 27911.

Appeal: ESTOPPEL. A party who invites, urges and consents to an order cannot later be heard to complain that there was error in such order.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

R. M. Switzler, for appellant.

Cranny & Moore, contra.

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and RAPER and RYAN, District Judges.

RYAN, District Judge.

On October 29, 1929, A. B. Gordon recovered a judgment against Rosamond Clark in the circuit court of Nodaway county, Missouri. On July 5, 1930, he commenced an action in the district court for Douglas county, Nebraska, on the foreign judgment. At that time Rosamond Clark was a resident of Missouri and service was secured by attaching certain money in the hands of one A. M. Anderson, who, at that time, had money in her possession claimed belonging to the defendant, Rosamond Clark. It appears that Rosamond Clark had commenced an action against A. M. Anderson and others to obtain this money. Other

parties intervened and claimed the money or a part thereof. It also appears from the transcript that the plaintiff in this action, A. B. Gordon, was, by order of court, brought into this other action as an intervener, and on September 12, 1930, the court entered an order, sustaining the garnishment of the plaintiff, A. B. Gordon, finding against the claims of the other interveners, and further finding that the defendant, A. M. Anderson, had in her possession the sum of $1,550, which was the property of Rosamond Clark, and further ordering A. M. Anderson, the garnishee, to pay said sum to the clerk of the court, "to be held subject to and applied on any judgment rendered in favor of A. B. Gordon and against Rosamond Clark in the case shown in Appearance Docket 264, No. 65."

There is no bill of exceptions in this case and the transcript is incomplete. It appears, however, from the briefs and the statements of counsel, that this order, so far as the payment of the moneys into court, was made in pursuance of a stipulation of the parties to this action. The stipulation does not appear in the transcript.

The defense interposed by the appellant, Rosamond Clark, who for the sake of convenience will be referred to as the defendant, admitted the allegations of plaintiff's petition in regard to the securing of the Missouri judgment and the amount thereof, and alleged that the judgment sued on is a deficiency judgment, growing out of the foreclosure of a deed of trust in Missouri. It further alleges that, at the time of the execution of the note described in plaintiff's petition, defendant was a married woman, being the wife of Fred H. Clark, one of the makers of said note; that the property sought to be reached by the plaintiff herein, namely the sum of $1,550 on deposit with the clerk of court, is property acquired by defendant after the execution of said note and mortgage, said money being proceeds from the sale of a farm owned by her in the state of Nebraska since April 12, 1929, and that, as such, it is not subject to seizure by the plaintiff. The answer also pleads section 7323 of the Revised Statutes of Mis-

souri for 1919, as follows: "A married woman shall be deemed a femme sole so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue and be sued at law or in equity, with or without her husband being joined as a party: Provided, a married woman may invoke all exemption and homestead laws now in force for the protection of personal and real property owned by the head of a family, except in cases where the husband has claimed such exemption and homestead rights for the protection of his own property." Upon trial of the case on November 3, 1930, judgment was rendered in favor of the plaintiff upon the Missouri judgment in the sum of $3,898.21.

On November 5, 1930, the defendant filed a motion in the district court, setting up the facts alleged in her answer and including section 7323 of the Revised Statutes of Missouri for 1919, and moved the court for an order releasing to her the sum of $1,550, held by the clerk of court under the order of September 12, 1930, pursuant to the stipulation of the parties. November 15, 1930, the plaintiff, A. B. Gordon, filed a motion, asking the court to strike the motion of the defendant for the reason that the same is immaterial, and for an order directing the clerk of court to pay to the plaintiff the $1,550, in his possession pursuant to the stipulation entered into in the case of Clark v. Anderson. The motion further sets out section 7328 of the Revised Statutes of Missouri for 1919, as follows: "All real estate and any personal property, including rights in action, belonging to any woman at her marriage, or which may have come to her during coverture, by gift, bequest or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, or has grown out of any violation of her personal rights, shall, together with all income, increase and profits thereof, be and remain her separate property and under

her sole control, and shall not be liable to be taken by any process of law for the debts of her husband. This section shall not affect the title of any husband to any personal property reduced to his possession with the express assent of his wife: Provided, that said personal property shall not be deemed to have been reduced to possession by the husband by his use, occupancy, care or protection thereof, but the same shall remain her separate property, unless by the terms of said assent, in writing, full authority shall have been given by the wife to the husband to sell, incumber or otherwise dispose of the same for his own use and benefit, but such property shall be subject to execution for the payments of the debts of the wife contracted before and during marriage, and for any debt or liability of her husband created for necessaries for the wife or family; and any such married woman may, in her own name and without joining her husband, as a party plaintiff institute and maintain any action, in any of the courts of this state having jurisdiction, for the recovery of any such personal property, including rights in action, as aforesaid, with the same force and effect as if such married woman was a femme sole: Provided, any judgment for costs in any such proceeding rendered against any such married woman, may be satisfied out of any separate property of such married woman subject to execution: Provided, that before any such execution shall be levied upon any separate estate of a married woman, she shall have been made a party to the action, and all questions involved shall have been therein determined, and shall be recited in the judgment and the execution thereon." December 29, 1930, the court sustained the plaintiff's motion to strike the defendant's motion and ordered the moneys held by the clerk of the district court for Douglas county to be paid to the plaintiff. From this order the defendant, Rosamond Clark, appeals to this court.

Appellant contends that although the validity of a contract is to be determined by the laws of the place where it is made, or by the law of the place of performance, the

remedy for the enforcement of the judgment is governed by the law of the place where the remedy is being sought. She contends that, inasmuch as the law of Nebraska will not permit the after acquired property of a married woman to be subjected to the payment of a judgment on a debt contracted prior to the acquisition of the property, the money in the hands of the clerk of the district court for Douglas county cannot be reached for the payment of this judgment. However, there is nothing before us to show that the money involved herein is the proceeds of after acquired property, except the statement in appellant's motion, which, of course, is no proof of the averment.

But, whatever the facts may be in that regard, it appears from the record that the appellant stipulated with the appellee, in the case of Clark v. Anderson, that the money involved in this action, to wit, the sum of $1,550, and which was the subject of the garnishment in said action, should be paid to the clerk of the district court for Douglas county, "to be held subject to and applied on any judgment rendered in favor of A. B. Gordon and against Rosamond Clark in the case shown in Appearance Docket 264, No. 65." If, therefore, there was any error in the order of the court which was appealed from, it is apparent that the appellant herself invited it, when she entered into the stipulation above referred to. It has been repeatedly held, and is the law of this state, that a party cannot invite, urge and consent to an order and judgment and then later complain of the alleged error so invited. *In re Estate of Mattingly,* 121 Neb. 90; *Campbell v. Crone,* 10 Neb. 571; *Missouri P. R. Co. v. Fox,* 60 Neb. 531.

This seems to be conclusive of the issues raised in this appeal, and it is unnecessary to decide the other questions raised. The judgment of the district court was correct and is

AFFIRMED.

THEODORE J. WEBER V. STATE OF NEBRASKA.

FILED JANUARY 28, 1932. No. 27990.

1. **Information.** An information which charges an offense substantially in the language of the statute is sufficient.
2. **Penal Statutes: CONSTRUCTION.** It is elementary that penal statutes are inelastic and must be strictly construed. They are never extended by implication.
3. **Evidence** examined and *held* insufficient to sustain a conviction.

ERROR to the district court for Boyd county: ROBERT R. DICKSON, JUDGE. *Reversed and dismissed.*

W. T. Wills, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and RAPER and RYAN, District Judges.

RYAN, District Judge.

The plaintiff in error, Theodore J. Weber, was convicted of the crime of wife and child abandonment in the district court for Boyd county under section 28-458, Comp. St. 1929, and from a judgment of guilty on the verdict and a sentence of one year's imprisonment in the penitentiary he has brought the case to this court for review. For convenience in this opinion the plaintiff in error will be referred to as the defendant.

On February 26, 1931, the county attorney filed an information in the district court for Boyd county, reading as follows: "That Theodore J. Weber late of the county aforesaid, did, on the sixth day of March, A. D. 1930, in the county of Boyd and state of Nebraska aforesaid, Theodore J. Weber then and there being, then and there unlawfully and wilfully, feloniously and without cause, abandon his wife, Merna J. Weber and his minor child under the age of sixteen years and did, unlawfully and wilfully, feloniously neglect and refuse to provide for said wife and said minor child under the age of sixteen years, without just cause, contrary to the form of the statute in

such case made and provided, and against the peace and dignity of the state of Nebraska."

Section 28-458, Comp. St. 1929, reads as follows: "Whoever, without good cause, abandons his wife and wilfully neglects or refuses to maintain or provide for her, or whoever abandons his or her legitimate or illegitimate child or children under the age of sixteen years, and wilfully neglects or refuses to provide for such child or children, shall, upon conviction, be deemed guilty of a desertion and be punished by imprisonment in the penitentiary for not more than one year, or by imprisonment in the county jail for not more than six months."

It will be seen that the information is substantially in the wording of the statute except that it fails to allege whether the child was legitimate or illegitimate. This court has several times held that an information in the wording of the statute is sufficient. In this case there was a substantial compliance, since the statute embraces both classes of children, and the assignment is without merit.

It is also contended that there is no evidence showing abandonment on the part of the husband. The evidence disclosed that the defendant and the complaining witness, Merna J. Weber, were married at Yankton, South Dakota, on May 3, 1928, while both of them were attending the high school at Butte, Nebraska. At that time the complaining witness was seventeen years of age and the defendant was nineteen. They made their home with the defendant's parents until about the 1st of September, 1928. The defendant then went to North Dakota to work and his wife stayed with her parents until the first part of November, 1928, when they both went to Tyndall, South Dakota, where they worked about three weeks. They returned to Butte early in December, 1928, and spent the winter of 1928-1929 with the defendant's parents. About the 1st of February, 1929, they moved to a farm southwest of Butte, belonging to the defendant's parents. Neither the defendant nor his wife were possessed of any property or money; the defendant's mother loaned them

money enough to start farming. The child was born on April 5, 1929. They lived together on this farm until some time in August, 1929, when the complaining witness left the defendant. There is some conflict in the testimony as to the cause of this action on the part of the complaining witness. She testified that on certain occasions the defendant had beaten and bruised her and called her names. The testimony with regard to any particular abuse or ill treatment practiced upon the complaining witness by the defendant is rather indefinite. Her testimony is rather general on this point and consists of such statements as this: He was mean to me, and he would call me names and knock me around and beat me and hit me and strike me and I didn't care to take any such abuse. The defendant positively denies that he ever struck his wife or subjected her to any physical abuse, and testifies that, after the baby was born, she refused to work and thought only of spending money. All three of the times she left him, she went directly to the home of her parents, and, if there were any evidences of any physical abuse upon her person at those times, no witness other than herself has testified to them. The quarrels do not seem to have been very serious and complaining witness returned to the defendant's home on September 13, 1929.

She then remained with the defendant until the fore part of December, 1929, when they again quarreled and she again left him and started an action for divorce against him. The divorce action was abandoned, on the very salutary advice of the trial judge that they go back and try once more to make a home. Mrs. Weber returned to her husband about December 29 or 30, 1929. This time they lived together until March 4, 1930, when another quarrel occurred and the complaining witness again left the defendant. The circumstances of this last quarrel are very much in dispute. Complaining witness testifies that the defendant took the baby from their home to the home of his parents and informed her that she could not get the baby until she went to law. The defendant's version of it

is that the baby had been sick; that the complaining witness was not giving it proper attention; and that the baby was taken and left with his parents from about the 12th of January until March 4. The defendant was at home and in the house when the complaining witness left on March 4, 1930. It appears that she did not see him nor attempt to see him, nor to communicate with him in any way, until she filed the complaint against him for nonsupport on October 3, 1930.

After March, 1930, the defendant contributed nothing to the support of his wife. His mother did, however, send some money to her at different times. The amount of this is in dispute. Complaining witness testifies it was $25, and the defendant's mother says it was $50. After the complaining witness left the defendant's home, the defendant found a letter written by her that day to an uncle, as follows:

"Dear Uncle George: I don't really think I have a right to call you that any more but I used to. You know or rather remember Will Fritz? I am his second girl and was up to see you the time I was in the Hills. The light headed one that looks like her mother. Would you do me a favor or have your daughter do it. Let me know what kind of luck a person would have up in that country finding a job. I have had trouble with my husband and we are separating. I have to have something to do and happened to think of you folks.

"Hoping to hear from you real soon,

"I remain,

"Mrs. Merna Weber.

"Butte, Nebr."

In the later part of March, 1930, the defendant took up his residence in the state of Nevada, at Reno, and on June 24, 1930, commenced a divorce action against the complaining witness at that place. The expenses of obtaining the divorce seem to have been borne by the defendant's mother. She held a chattel mortgage upon the personal property of the defendant, which was foreclosed

after their marital difficulties. There are many other matters set out in the bill of exceptions, but this, in brief, is a résumé of the stormy married life of these young people.

Under this state of facts, it is hard to conceive how it can be said that the defendant is guilty, beyond a reasonable doubt, of the crime of wife and child abandonment. The evidence clearly shows that he was in the family home at the time the wife left; he did not order her to go; she left of her own accord and made no attempt to communicate with him thereafter except through the strong arm of the law. In the case of *Preston v. State,* 106 Neb. 848, speaking of abandonment, this court said:

"No inflexible rule can be laid down in cases of this kind; each must be decided on its own merits. The statute was intended for a wise purpose, but is capable of abuse and being made an instrument of intolerable oppression. It is elementary that penal statutes are inelastic and must be strictly construed; they are never extended by implication."

It is apparent from a reading of the record in this case that these young people entered into the marriage state hastily and without a proper realization of the seriousness of the step they were taking, or of the mutual obligations and duties incident to it. It is also apparent that neither of them ever made a proper effort to adjust themselves to each other's shortcomings, nor made proper allowance for them. It is equally apparent that both of them have been badly advised. Outside of the advise of the learned trial judge, whose humanitarianism is well known, they appear to have received no wholesome advice. The complaining witness was ill advised when she commenced the divorce action in December, 1929. After she left the defendant's home on March 4, 1930, the defendant went to Reno, Nevada, and obtained a divorce. That was an ill advised action on his part and his conduct in that regard cannot be too strongly condemned. It, however, took place after his wife had left him and the evidence fails to show

any connection between it and their separation. The testimony is, in our judgment, insufficient to support a conviction.

The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

RAPER, District Judge, dissents.

D. M. JUDKINS-DAVIES, APPELLANT, V. FRANK SKOCHDOPOLE ET AL., APPELLEES.

FILED JANUARY 29, 1932. No. 28007.

APPEAL from the district court for Sherman county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

J. E. Ray and *Earl L. Hunter,* for appellant.

Mayer, Kroger & Mayer, contra.

Heard before GOSS, C. J., EBERLY and PAINE, JJ., and BEGLEY and ELDRED, District Judges.

PER CURIAM.

This is a controversy as to the priority of certain mortgage liens on a quarter section of land in Sherman county. In a foreclosure proceeding the district court decreed Arthur C. Mayer's $3,500 mortgage to be a first lien on the south half of the quarter section and his $2,500 mortgage to be a first lien on the north half of the quarter section. This was in accord with the stipulation of all parties on the trial. The decree also adjudicated the $5,000 mortgage of F. J. Coates to be a second lien on the whole of the quarter section and the $2,400 mortgage of the plaintiff to be a third lien on the whole of the quarter section. Plaintiff appealed on the ground that the court erred in not ranking her lien ahead of that of Coates.

Plaintiff is a doctor at Ingleside in Adams county. She kept an account in the Citizens State Bank of Ravenna. A. E. Erazim, of Ravenna, in the north part of Buffalo

county near the Sherman county line, was the cashier and in active management of the bank. F. J. Coates, residing at Grand Island, was the president of the bank, and generally visited it once a month for a few hours. The evidence shows that, from time to time since 1924, plaintiff's surplus funds from her account in the bank had been invested locally at Ravenna in mortgages, warrants and unsecured temporary loans. These investments, totaling a substantial amount, were placed by Mr. Erazim, who reported to Mrs. Davies from time to time as to the securities in which he had made investments for her. None of the matters were handled by any one else. He himself borrowed $1,400 of her and gave his note therefor. The business was done by correspondence. No criticism was made as to any of the dealings except as to the $2,400 mortgage.

In June, 1927, the Penn Mutual Life Insurance Company commenced a foreclosure of an $8,000 mortgage on this land, owned by defendant Frank Skochdopole, and on which the bank then held a second mortgage of $5,000. To refinance and pay off the liens on the land, Skochdopole, on April 6, 1928, made the two Mayer mortgages, aggregating $6,000; and on April 21, 1928, made a new mortgage to the Citizens State Bank of Ravenna for $5,000, containing a recital—"subject to first mortgages of $2,500 and $3,500 respectively." At the same time he made the $2,400 mortgage to A. E. Erazim containing the recital—"subject to previous incumbrances." On May 4, 1928, Erazim assigned this mortgage to plaintiff and on May 11, 1928, the bank assigned the $5,000 mortgage to Coates. Both mortgages had been sent by mail for record at the county seat in the same envelope without any instructions as to which should be filed first or which should have priority. Both were filed for record at the same moment, as shown by the indorsements made by the county clerk. But the $2,400 mortgage was first entered on the numerical index, and in recording them the $2,400 mortgage was on the next page preceding the record of the $5,000 mortgage.

Erazim testified it was his plan when it was made to have the $5,000 mortgage subject to the Mayer mortgages and the $2,400 mortgage as a third mortgage. He testified that, when he sold the $5,000 mortgage to Coates, he told Coates it was a second mortgage, and Coates bought it and paid for it in that belief. Coates testified that Erazim told him there were rather heavy cash withdrawals from the bank and he needed cash to keep up the cash balance and Coates informed him he would supply it. They went through the note case until they came to the Skochdopole $5,000 note. Erazim informed him how it was secured and told him it was a second mortgage. It was on a piece of land Coates knew. He took that and other notes and gave a check for the full amount of the various notes, paying $5,000 and accrued interest for the note and mortgage. The note and mortgage were assigned to him and he took them home to Grand Island. The bank closed about a year and a half later. He needed money and tried to sell his mortgage to plaintiff. Once at the home of a friend of both parties in Ravenna, and again at Mayer's office in Grand Island, Coates testified, he and plaintiff discussed the mortgage on the Skochdopole land and she never claimed hers was prior to his until later when her attorney looked the matter up and found hers was recorded ahead of his. Plaintiff testified she never knew until after the bank failed and she received the papers that hers "was not a first mortgage."

The mere fact that the $2,400 mortgage was indexed and recorded just ahead of the $5,000 mortgage does not, of itself, give it priority. Section 76-217, Comp. St. 1929, in the circumstances of their delivery by mail without instructions, requires them to "be considered recorded from the time of such delivery." By its terms the $5,000 mortgage was expressly made subject only to the Mayer mortgages, and by its terms the $2,400 mortgage was expressly made subject to all previous incumbrances. The evidence further shows that Erazim did all the business with both Skochdopole and Mrs. Davies and Coates had no

part in relation to either except as he learned from the securities and from Erazim; that it was understood between Erazim and Skochdopole that the $2,400 mortgage was subject to the others; and that, at the time the parties purchased the mortgages, the land was worth $16,000.

It thus appears that it is a disputed question of fact, to be determined from the evidence, which of the two mortgages is prior. We are impressed by reading it, as we were on its recital on the oral argument, that the trial court, who saw and heard the witnesses, was right in the finding and order as to the priority. Therefore, the judgment of the district court is

AFFIRMED.

MALCOLM R. BLACK, APPELLANT, V. NATIONAL UNION FIRE INSURANCE COMPANY, APPELLEE.

FILED JANUARY 29, 1932. No. 28084.

Evidence examined, and *held* to support the judgment entered herein.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

John J. Ledwith and *Fred M. Deweese*, for appellant.

Crofoot, Fraser, Connolly & Stryker and *James T. English, contra.*

Heard before GOSS, C. J., EBERLY and PAINE, JJ., and BEGLEY and ELDRED, District Judges.

PER CURIAM.

This is an action instituted by appellant Black to recover the sum of $1,500 and interest, alleged to be due under a fire insurance policy issued by the appellee to one L. K. Forney and subsequently assigned to appellant. The subject of insurance was a dwelling-house located on a farm in Clarke county, Iowa, which was destroyed by fire on February 24, 1928. There was a trial to a jury, resulting in a verdict for the insurance company. From the order of the trial court overruling his motion for a new trial, plaintiff appeals.

It appears that on the 14th day of November, 1927, Malcolm R. Black, appellant, as the then owner of the real estate involved, executed a warranty deed in proper form purporting to convey the land described therein, being the land on which the house in suit was located, to J. L. Ritchardson and Anese Ritchardson, husband and wife. This deed was filed for record in the office of the county recorder of Clarke county, Iowa, on November 23, 1927, and was mailed by the county recorder to the grantee therein named, who thereafter retained it. Appellee alleges that, this conveyance having been made and entered into prior to the date of the fire, the appellant at the time of the fire had no title to the real estate, and by reason of the conveyance, under the terms of the policy in suit, was not entitled to recover thereon.

The facts in the record disclose without question that in February, 1927, the appellant acquired the land on which the house then insured by the terms of the policy in suit was situated.

On October 28, 1927, the appellant, as owner of the premises, and as "party of the first part," entered into a sale contract in writing with one J. L. Ritchardson and wife, as "party of the second part," which in terms evidenced the fact that the "party of the first part" had sold to the "party of the second part" the farm therein described (on which the building in question was situated), "together with all appurtenances thereto belonging and now thereon," for $11,182.50, $250 of which was cash, $450 payable on or before March 1, 1928, and the balance by the assumption by second party of mortgages in said contract described and referred to. By the terms of this written instrument the second party also agreed to carry $2,000 insurance on the property, payable in case of loss to first party. First party also agreed therein to furnish "a warranty deed and a good and merchantable abstract of title, on or before March 1, 1928." and to pay for insurance on buildings up to March 1, 1928, and agreed to give possession by March 1, 1928.

Some time after the making of this contract, Ritchardson was asked to accept a warranty deed in terms transferring the land to him subject to the unpaid balance of the $15,000 mortgage to the Lincoln Joint Stock Land Bank of Lincoln, and thereupon, with his wife, to execute an extension agreement extending the time of the payment of the unpaid balance. The substance of his answer to this proposition may be epitomized as follows: "I told him they could change the deed over to me before March 1st, if it didn't interfere with the contract any, that the contract went ahead the same. You see I was to pay $432.50 more money before I was to get the deed and I wasn't to pay this over until the 1st of March." Thereupon Black executed the deed of November 14, 1927, hereinbefore referred to. Following this Ritchardson and wife, it appears, executed the extension agreement. It is also stipulated that the mortgage so extended remained on record until February 23, 1928. On that date J. L. Ritchardson and wife, Anese, executed two mortgages to the Lincoln Joint Stock Land Bank, one securing the sum of $6,500 was thereupon recorded in book 55 of mortgages at page 203, and the other securing the sum of $4,000 (both covering the same premises) was recorded in book 55 at page 204. After these mortgages last referred to had been recorded, the Lincoln Joint Stock Land Bank executed and filed a release of the first described mortgage, dated February 29, 1928, which was recorded in book 22 of mortgages at page 443 of the mortgage records of Clarke county, Iowa. It may be said that there is no evidence as to the facts of the transaction, which the existence of the last two mortgages referred to suggests must have taken place between the execution of the extension agreement heretofore referred to and the 23d day of February, 1928. It is also stipulated that no consent was ever asked of, or given by, the defendant insurance company to the conveyance of the property in question, or of any new or change of incumbrances on the land.

The policy in suit contains the following provision: "IV.

Unless otherwise provided by agreement of this company this policy shall be void: * * * (d) If the interest of the insured be other than unconditional and sole ownership; or (e) if the subject of insurance be a building on ground not owned by the insured; or (f) if any change other than by death of the insured, whether by legal proceedings, judgment, voluntary act of the insured or otherwise, take place in the interest, title, possession or use of the subject of insurance, if such change in the possession or use makes the risk more hazardous; or (g) if the subject of insurance or a part thereof (as to the part so incumbered) be or become incumbered by lien, mortgage or otherwise created by voluntary act of the insured or within his control." It was also stipulated by the parties that the contract sued on was an Iowa contract, and governed by the statutes of Iowa as construed by the supreme court of that jurisdiction. In this respect the record proceeds as follows: "It is hereby stipulated and agreed between the parties that the following statutes were effective on the date of the alleged loss by fire of the plaintiff's house, and they are still effective and are the pertinent statutes relied upon by both parties in this action, and they are set forth in the Code of Iowa for 1924 as follows: (Then there is set forth verbatim sections 8976, 8977, 8978, 8980, 8981 of the Code of Iowa for 1924)."

The questions presented for review are: Has the trial court properly construed the statutes of the state of Iowa which are set out in the record as applied to the facts embraced in the bill of exceptions by stipulation and evidence? and, is the verdict supported by sufficient evidence? This tribunal may not take judicial notice of the terms of the statutes of a foreign state nor of the construction given such statutes by the superior courts of such foreign state. Thus, in the instant case, both the terms of the statute of a foreign state, and their accepted construction in its tribunals, are alike questions of fact to be established by proper proof. Conceding that the stipulation in the record fully covers the matter of the terms of the statutes

of Iowa, there is nothing in the stipulation relating to their accepted construction by the courts of that state. "The unwritten or common law of any other territory, state, or foreign government, may be proved as facts by parol evidence, and the books of reports of cases adjudged in their courts may also be admitted as presumptive evidence of such law." Comp. St. 1929, sec. 20-1269. See, also, *Steinke v. Dobson*, 90 Neb. 616; 5 Ency. of Evidence, 830, 831; 23 C. J. 131.

In the case before us the bill of exceptions fails to show that any proof was made in the trial court as to the proper construction of the laws of Iowa as made by the supreme court of that state. Taking this omission as a fact, in connection with all the facts which appear in the record, it does not affirmatively appear that the trial court erred in the instructions excepted to, and it is plain that the verdict of the jury has ample support in the evidence which was submitted to them.

The action of the trial court we deem, in all things, correct, and its judgment is

AFFIRMED.

EDWARD A. JOHNSON, APPELLEE, V. JOHN WESKAMP, APPELLANT.

FILED JANUARY 29, 1932. No. 28098.

1. **Appeal**: PLEADING: ISSUES. "The general rule that the allegations of the pleadings and proof thereunder must agree will not be applied to reverse a judgment, where an issue is tried by both parties without objection from either that such issue is not sufficiently pleaded. Under such conditions, the appellate court will consider the pleadings as sufficient to raise the particular issue." *Hensley v. Chicago, St. P., M. & O. R. Co.*, 118 Neb. 690.
2. **Equity**. "A court of equity, having obtained jurisdiction of a cause, will retain it for all purposes, and render such decree as will protect the rights of the parties before it, and thus avoid unnecessary litigation." *Buchanan v. Griggs*, 20 Neb. 165.
3. **Evidence** examined, and *held* to sustain the findings and decree.

APPEAL from the district court for Frontier county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Cordeal, Colfer & Russell and *F. J. Schroeder,* for appellant.

Butler & James, contra.

Heard before ROSE, DEAN, GOOD and DAY, JJ., and THOMSEN, District Judge.

GOOD, J.

This is an action in equity to establish the boundary line between the southeast and the southwest quarters of section 25, township 5 north, range 29 west, in Frontier county, Nebraska, and to quiet title to the said southeast quarter in plaintiff.

Plaintiff is the owner of the southeast quarter and defendant the owner of the southwest quarter of said section. The boundary line between the two quarters was not definitely known, and each entertained a different view as to the location thereof. In the petition it was alleged that the parties had agreed to establish the boundary line at a point 160 rods east from a fence maintained on or near the west boundary line of defendant's quarter section, and that this line should be the true boundary. Plaintiff prayed the court's approval and decree that such boundary should be the true boundary. Defendant denied this agreement and alleged, in substance, that they had agreed to establish the boundary line by measuring 480 rods west from the east line of section 30, in township 5, range 28, said section lying immediately east of and adjacent to section 25. The court found that neither of the agreements contended for by the parties was established by the evidence, but found from the evidence that the true boundary line was at a point intermediate between those contended for by the parties. Defendant alone has appealed. Since plaintiff has not appealed, the finding that the agreement alleged by him was not established by the evidence must be accepted as correct.

Defendant complains that the court erred in finding that the agreement by him alleged, with respect to the boundary line, was not sustained by the evidence. This contention is without merit. The record is devoid of proof that would support any such agreement as contended for by defendant.

Defendant further contends that the findings and judgment are supported neither by the pleadings nor by the evidence, the principal argument being that the issue as to the true boundary line was not presented by the pleadings.

The record discloses that both parties offered evidence, which was received without objection from either, tending to show the location of the true boundary line. Both parties treated the pleadings as putting in issue the location of the true boundary line. They tried that question to the court, although it may not have been formally and technically presented by the pleadings. Defendant contends for the rule that the allegations and proof must agree. Such is the general rule, but it has some well-recognized exceptions.

In *Hensley v. Chicago, St. P., M. & O. R. Co.*, 118 Neb. 690, it was held: "The general rule that the allegations of the pleadings and proof thereunder must agree will not be applied to reverse a judgment, where an issue is tried by both parties without objection from either that such issue is not sufficiently pleaded. Under such conditions, the appellate court will consider the pleadings as sufficient to raise the particular issue." Holdings to like effect by this court have been made in *Auld v. Walker*, 107 Neb. 676; *Sjogren v. Clark*, 106 Neb. 600; and *Boyd v. Lincoln & N. W. R. Co.*, 89 Neb. 840. Applying this rule, we think the court was justified in treating the pleadings as raising the issue as to the location of the true boundary line between the two quarter sections.

Another rule, quite applicable to the situation presented in this case, is: "A court of equity, having obtained jurisdiction of a cause, will retain it for all purposes, and render such decree as will protect the rights of the parties

before it, and thus avoid unnecessary litigation." *Buchanan v. Griggs,* 20 Neb. 165. This rule was followed and applied in *Seng v. Payne,* 87 Neb. 812; *Bell v. Dingwell,* 91 Neb. 699; and *Shevalier v. Stephenson,* 92 Neb. 675.

In the instant case, the court had jurisdiction of the controversy to quiet plaintiff's title to the southeast quarter of said section 25. Necessarily, it was required to determine where the boundary lines of that quarter were. In fact, that was the principal point in dispute. We think the court was vested with jurisdiction, under this rule, to determine the true boundary line.

Defendant urges that the evidence does not sustain the findings of the court. The court found that the northeast and the southeast corners of the southeast quarter were marked and designated by stones placed there by authority, and that the southwest corner of said quarter section was marked by pits and a mound, indicating the original government quarter corner. The northwest corner of said quarter section was found to be 38.80 chains west from the northeast corner of the southeast quarter and to be 39.80 chains east from the west section line of said section 25. The record discloses that the south half of section 25 contains approximately 314 acres, instead of the customary 320 acres to a half section. The result of establishing the boundary line, as found by the court, awards to plaintiff approximately 156 acres and to defendant 158 acres.

We are satisfied, from an examination of the entire record, that the finding of the court, with respect to the boundary line between the two quarter sections, is amply sustained by the evidence, and we concur in that finding.

No error prejudicial to defendant has been found. Judgment

AFFIRMED.

ALBERT J. BLOCHOWITZ ET AL., APPELLEES, V. FRANK J. BLOCHOWITZ ET AL., APPELLANTS.

FILED JANUARY 29, 1932. No. 27915.

1. **Deeds**: DELIVERY. A delivery of a deed of conveyance is sufficient if the grantor deliver it to a third person unconditionally for the use of the grantee, the grantor reserving no control over the instrument; and the wife of the grantor may be such "third person," to whom such lawful delivery of the deed may be made by the husband for the use and benefit of their children.
2. **Evidence** examined and *held* to establish the legal delivery of the deeds in suit.
3. **Deeds**: SETTING ASIDE: MENTAL CAPACITY. To set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that he could not understand and comprehend the purport and effect of what he was then doing.
4. ———: ———: UNDUE INFLUENCE. Undue influence which will avoid a deed is an unlawful and fraudulent influence which controls the will of the grantor. The affection, confidence and gratitude of a parent to a child which inspires the gift is a natural and lawful influence, and will not render it voidable, unless this influence has been so used as to confuse the judgment and control the will of the donor.
5. **Witnesses**. Even though a witness is shown to have testified falsely in some respects, his testimony as to matters concerning which he is corroborated by evidence of a credible nature should be considered and may be believed.
6. **Evidence**: ADMISSIBILITY: UNDUE INFLUENCE: MENTAL CAPACITY. Where the issue is undue influence and testamentary or mental incapacity, admission in evidence of former wills as tending to prove that the contested will, or other form of conveyance, was in substantial conformity with the testator's (and grantor's) former expressed purpose, made at a time when his competency is unchallenged and the existence of undue influence is not charged, is approved.
7. ———: ———. A prior will, executed when the testator's testamentary or mental capacity was and is unquestioned, and as to which the existence of undue influence is not charged, and which conforms substantially as to results produced to the instrument contested, may be considered as competent evidence for the purpose of refuting charges of undue influence or want of testamentary or mental capacity by showing that the testa-

tor (and grantor) had a constant and abiding scheme for the distribution of his property.

8. Evidence examined and *held* to establish the validity of the deeds in suit.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Reversed, with directions.*

Mockett & Finkelstein, Thomas J. Dredla and *Roy B. Ford,* for appellants.

John J. Ledwith and *Hall, Cline & Williams, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

EBERLY, J.

This is a proceeding in equity to cancel four warranty deeds which the amended petition charges "were executed on April 4, 1929," by Joseph Blochowitz when he "was eighty-five years of age, and because of his extreme age and the condition of his health he was mentally incompetent to execute such conveyances;" as to which it is further alleged that they "were procured by fraud and undue influence, practiced by the defendants John A. Blochowitz, Frank J. Blochowitz and George Blochowitz * * * and * * * were never delivered." The plaintiffs are Albert J. Blochowitz, Lena M. Yankton, and Anna Geistlinger, who are respectively the brother and sisters of the defendants named above. Rosalia Blochowitz, widow of Joseph Blochowitz, who is the mother of all of the other parties to this litigation, is also made a party defendant. She joined with her husband in the execution of the four conveyances in suit, but, as to her, the pleadings make no charge of participation in fraud or in the exercise of undue influence; neither is her competency challenged, nor is it alleged that she was in any manner deceived or defrauded in the transaction, or that she was the subject of undue influence. The allegations of the amended petition were traversed by appropriate pleadings, and upon the issues thus formed a trial was had, which resulted in a decree

for the plaintiffs. Motions for new trial were filed by defendants, which were by the court overruled. Defendants appeal.

This court is now, by statute, to determine the issues *de novo* from the six volume record before us.

The consideration of the disputed evidence must be made in the light of the following facts: Joseph Blochowitz and his wife, Rosalia, were natives of Poland, but of German stock. They migrated to the United States in the year 1880, and purchased a quarter section of land in Lancaster county in January, 1884, on which they thereafter made their home. To them seven children were born, one of whom died in infancy, and six of whom were living at the time of the death of the father on February 20, 1930. There is no dispute in the evidence that life in this family was a life of unremitting service and toil. From the age of thirteen years the sons were required to carry on as men. The labors were incessant, the hours were long, entertainment and relaxation were unknown, with frugal fare and meager compensation. All parties concede that for many years, even after the sons attained their respective majorities, the father received and appropriated the fruits of the common toil, managed and controlled it as his own property, and ruled his household like the patriarchs of old, with a conceded power and supremacy unchallenged by its membership.

Reference in the briefs is made to the fact that the savings of Joseph Blochowitz and his wife, accumulated during the seventeen years after the purchase of their Lancaster county home, were unwisely loaned to the proprietor of a lumber yard at Crete, Nebraska, resulting in a total loss. So, after this incident, about the year 1898, the Blochowitz family continued their toil in pursuit of a fortune. In the meantime, in March, 1894, an additional eighty-acre tract had been acquired by the father. Thereafter further purchases of real estate were made by him until in July, 1904, when he bought the S. E. ¼ of section 14, township 8, range 5, he had become the owner of 640

acres of land, all situated in the immediate vicinity of the home place, and most of it thereto adjoining. The record indicates that the real estate was all paid for prior to 1910. In 1901 Lena Blochowitz, then eighteen years old, was married to Theodor Yankton, and in the same year her sister, Anna Blochowitz, then fifteen years of age, was married to Mathias Geistlinger, and both daughters thereafter removed to new homes with their husbands, and thereafter ceased to labor under the father's direction or for the benefit of his family. In 1903, according to the record in this case, the earliest will of Joseph Blochowitz was executed. It bears date September 4, 1903, is in due form, and by its terms Lena Yankton and Anna Geistlinger are to receive the sum of $100 each; Frank and John Blochowitz are each devised a quarter section of land, and Albert and George are each to receive eighty-acre tracts. In November, 1906, Lena Yankton is paid $1,000 cash by her father, which is receipted for, "as inheritance from Joseph Blochowitz and wife." In this connection it may be said that on January 26, 1920, Anna Geistlinger is paid a like amount by her father, and an identical receipt executed by her. On the 10th day of April, 1907, Joseph Blochowitz executed the second will, which is also in due form. By the terms of this instrument Lena Yankton and Anna Geistlinger are to receive legacies in the sum of $100 each, Frank and John Blochowitz are each devised 160 acres of land, to Albert is devised 80 acres, and a like amount is given his brother George. Rosalia Blochowitz is named as residuary legatee, and "all former wills and codicils by me made" are revoked. On the 10th day of October, 1910, another will was executed by Joseph Blochowitz. It is in due form; expressly revokes "all former wills by me made," bequeaths to Lena Yankton and Anna Geistlinger the sum of $100 each, and devises to Frank Blochowitz the S. E. ¼ of section 14; to John Blochowitz the S. ½ of the S. E. ¼ and the E. ½ of the S. W. ¼, all in section 11; to Albert Blochowitz the N. E. ¼ of section 14; to George Blochowitz the E. ½ of the N. W.

¼ of section 14, and the N. ½ of the N. E. ¼ of section 11, all in township 8, range 5, East of the 6th P. M.

In 1913 Frank J. Blochowitz and immediate family, by direction of his father, moved upon the S. E. ¼ of section 14, and thereafter improved, farmed and continued to reside thereon, the record title thereto continuing in the father. On April 4, 1929, Joseph Blochowitz and his wife executed four warranty deeds, each in due form, which purport to convey the following Lancaster county lands: To Frank J. Blochowitz the S. E. ¼ of section 14, reserving the payment of $600 to be made annually by grantee to grantors during their lifetime; to John Blochowitz the N. E. ¼ of section 14, reserving a $400 annual payment to be made by grantee to grantors during their lifetime; to Albert Blochowitz the N. ½ of the N. E. ¼ of section 11, reserving payment of $400 annually to grantors by grantee during lifetime of grantors; to George Blochowitz the E. ½ of the S. W. ¼ and the S. ½ of the S. E. ¼, all in section 11, also the E. ½ of the N. W. ¼ of section 14, reserving annual payment of $800 to be made by grantee to grantors during their lifetime, and also the reservation of two rooms in the premises by grantors during their lifetime. On April 4, 1929, after having signed and acknowledged the above conveyances, Joseph Blochowitz also executed a last will and testament. This instrument, in due and usual form, bequeaths to Anna Geistlinger and Lena Yankton the sum of $500 each, declares: "All of my four sons, Frank J., John, Albert, and George, are entitled to no further part of inheritance as all each and every one of them have received all that they are entitled to," revokes all former wills, but contains no residuary clause.

"Execution" of the four instruments in suit being admitted by the pleadings, the determination of the disputed question of their legal delivery is logically first for decision.

The testimony of George A. Hagensick, a witness called by, and testifying for, plaintiffs on this subject, is that

the four deeds in suit had been executed in his office on the 4th day of April, 1929, by Joseph Blochowitz and his wife. On the same day, after the drafting, signing and acknowledging of the deeds, Blochowitz had also executed his last will and testament, which it may now be said has been duly admitted to probate. Witness testifies that after this work had been completed he informed the Blochowitzes that, "if those deeds were not recorded, they should be turned in the hands of a third party." Mr. Blochowitz thereupon turned over the four deeds and his will, which were then contained in an unsealed envelope, to his wife, saying, "You keep those papers for the boys and girls." Mrs. Rosalia Blochowitz, also called as a witness on behalf of plaintiffs, in her testimony thus elicited fully corroborates the statements of witness Hagensick, and it cannot be denied that at the conclusion of this transaction she received and thereafter kept "for the boys" the deeds in question after the death of her husband until they were by her turned over to her son, Frank J. Blochowitz, and pursuant to her directions recorded.

Appellees challenge the legal sufficiency of these facts to sustain a delivery. In support of their position they cite the following from 1 Devlin on Deeds, 382: "There is no delivery of a deed made by a husband and wife to their children, where it is placed by the husband in the hands of the wife (who is one of the grantors) for safe keeping, and is retained in their possession and control." It would seem obvious that the facts contemplated by this language are not the facts involved in the instant case. The sole authority cited by the author in support of the text quoted is *Morris v. Caudle*, 178 Ill. 9. But the true application of the principle announced in the text and decision referred to is disclosed in the following quoted from the opinion in *Morris v. Caudle, supra:* "After the deed was executed, the grantor, Caudle, took it home with him and then handed it to his wife, and it was kept in the house where he and his wife resided, under his control,

until the last of July, 1885, when the wife sent it to the county seat to be recorded. If, upon the execution of the deed, Caudle had delivered it to his wife to be by her held for the grantees therein named, we would not hesitate to hold that the instrument was delivered."

A careful reading of *Joslin v. Goddard,* 187 Mass. 165, *Gaines v. Keener,* 48 W. Va. 56, and *Meador v. Ward,* 303 Mo. 176, also cited by appellees, is convincing that they are wholly inapplicable to the facts of the instant case. Indeed, the case last cited is in principle wholly opposed to appellees' contention.

The true rule appears to be that it is not essential to the validity of the deed that it should be delivered to the grantee personally. It is sufficient if the grantor delivers it to a third person unconditionally for the use of the grantee, the grantor reserving no control over the instrument. *Roepke v. Nutzmann,* 95 Neb. 589; *Johnson v. Becker,* 251 Mich. 132; *Sneathen v. Sneathen,* 104 Mo. 201; *Kittoe v. Willey,* 121 Wis. 548; *Gilmore v. Griffith,* 187 Ia. 327; *Hill v. Naylor,* 99 Neb. 791. In Nebraska the conveyance of real estate and the delivery of deeds conveying the same may be made direct by husband to wife. *Lavigne v. Tobin,* 52 Neb. 686; *Currier v. Teske,* 84 Neb. 60; *Furrow v. Athey,* 21 Neb. 671. And the wife of the grantor may be such "third person," to whom lawful delivery may be made by the husband for the use and benefit of their children. *Sneathen v. Sneathen,* 104 Mo. 201; *Kittoe v. Willey,* 121 Wis. 548; *Gilmore v. Griffith,* 187 Ia. 327; *Stout v. Rayl,* 146 Ind. 379.

However, appellees further contend that the probative force of the evidence of Hagensick and Rosalia Blochowitz on the subject of the delivery of the deeds is largely, if not wholly, destroyed because of the fact that as to certain details their evidence in the present case is wholly at variance with evidence given by them in certain depositions prior to the present trial. It may be said that there was a case pending in the county court of Lancaster county involving the probate of the will drawn at the time of the

execution of these deeds in suit. In this proceeding the parties in the instant case were also parties thereto. It also appears that the plaintiffs in the instant case procured the deposition of Hagensick to be taken, in which it is claimed in response to interrogatories he testified as follows, as to the delivery of the deeds in suit (after detailing the drafting and execution of the deeds and will): "Then I took the papers that were left there, the deeds and the will, and put them in an envelope and handed them to Mr. Blochowitz, and he said, 'No, give them to the Mrs.,' and (when he handed them over to her) he said, 'You take care of these.'" And to the question propounded to him, "Is that all he said?" this witness answered, "Yes." There are other answers in this deposition of similar tenor. But it also appears that after the taking of this deposition Hagensick was called as a witness in the probate proceeding then pending in the county court of Lancaster county, and to which the parties to this instant case were also parties. In that proceeding he testified as follows: "Q. Now, do you think of anything further, Mr. Hagensick, that was done there that afternoon in the making of this instrument? We just want to get everything that happened you know. Have you told the court everything that was said, and everything that was done there after the instrument was signed? A. I had the deeds and I took the deeds and this will and put them in an envelope and told Mr. Blochowitz, if these deeds are not delivered to the boys, they should be placed in the hands of a third party. I handed them to Mr. Blochowitz, and he, in turn, handed that envelope to Mrs. Blochowitz, who was sitting to the right side of him, and he said, 'Here are these papers. Take care of them for the boys and girls.'"

To the instant case Hagensick is not a party. So far as disclosed by the record he has no financial interest therein. He was called as a witness by plaintiffs, and examined in their behalf concerning the delivery of the deeds in suit by Blochowitz to his wife. His testimony was in all respects a substantial reiteration of the testimony given by

him in the county court. He was called and examined by plaintiffs as their witness with full knowledge of what that evidence had been. Thereafter upon the basis of, and with reference to, the first deposition, over objection, he was in effect cross-examined in a manner appropriate to impeachment, and the statements in such deposition on the subject of delivery of the deeds were, over objection, read to the witness in the presence of the court and thus in effect received in evidence as contradicting the statements then testified to by him. In this the trial court erred. The controlling rule applicable to the situation is: "Where one has been misled or entrapped into calling a witness by reason of such witness, previous to the trial, having made statements to the party, or his counsel, favorable to the party's contention, and at variance with the testimony given at the trial, and the party believed and relied upon such statements in calling the witness, and is surprised by the testimony on a material point, he may, in the discretion of the court, be permitted to show the contradictory statements made before the trial." *Penhansky v. Drake Realty Construction Co.*, 109 Neb. 120. But in the instant case the plaintiffs, in the light of the facts fully known to them when they called this witness to the stand during the trial here under review, could not have been "misled" or "entrapped" by the statements appearing in the first deposition, in view of his subsequent testimony in the county court. It is incredible that they, then, in any manner relied thereon or were deceived by the testimony in this case actually given, and that they were actually "surprised" thereby is a conclusion wholly unsupported by the record and inconsistent with common sense. The prerequisites to invoking the application of the rule quoted were wholly absent, and the trial court therefore, it is considered, erred in failing to sustain objections seasonably made to this line of examination pursued by plaintiffs, who are in turn under the facts in this case bound by the evidence elicited by them, otherwise uncontradicted, unmodified by the evidence thus erroneously received.

It also follows that, giving full force and effect to the competent evidence before us, we are required to hold that a legal and effective delivery of the four deeds has been established by a clear preponderance of the evidence.

We have carefully read and considered the testimony of this record as to the mental capacity of the grantor on the date the deeds were executed. The testimony on this branch of the case covers a great many pages, and it would be impossible to give even a fair summary of it without extending this opinion to unwarranted length. The plaintiffs having alleged the incapacity of the grantor to make the deeds, the burden was upon them to establish such fact. This they have not done. Our conclusion of the record upon this phase of the case is that it falls far short of adequate proof of lack of mental capacity to make the deeds. The rule of law is well settled that, to set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that he would not understand and comprehend the purport and effect of what he was then doing. *Clark v. Holmes,* 109 Neb. 213; *Schley v. Horan,* 82 Neb. 704; *West v. West,* 84 Neb. 169.

The transactions evidenced by these warranty deeds are also challenged by appellees as being the fruits of fraud and undue influence. It is true that the parties involved are father and sons; that their mutual business transactions were continuous, close, confidential, and involved. Conceding for the moment only that the relations disclosed were of such a character, when taken in connection with the facts by plaintiffs claimed to exist, as to raise an inference or presumption of a present undue influence, or even a present constructive fraud, still the ultimate controlling principle is: "The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor. The affection, confidence and gratitude of a parent to a child which inspires the gift is a natural and lawful influence, and will not render

it voidable, unless this influence has been so used as to confuse the judgment and control the will of the donor." *Hacker v. Hoover*, 89 Neb. 317; *Brugman v. Brugman*, 93 Neb. 408; *Little v. Curson*, 114 Neb. 752.

According to the theory of plaintiffs, as outlined in their briefs, and to some extent presented in argument, the will of the donor was by unlawful and fraudulent influence controlled in the instant case; that prior to the induction of Albert J. Blochowitz into the United States military service in 1917, while the father was mentally competent, he, the father, transacted his own business, and all of the property was in his own name. In addition to 640 acres of land in Lancaster county, and a South Dakota farm, he at that time had also acquired, and then owned, mortgages and bonds to the extent of $100,000, or "a little better, which were kept in a tin bucket in father's and mother's bed room;" that "before the war (when Albert was 16 or 17 years old) Albert was told by Joseph (his father) that each son was to get a quarter section of land," and there was to be an equal division of the bonds and mortgages. When Albert got back from the army in 1919, "He found that he was outside the family circle. Things were different." The father acted "kind of sore;" that the father's business was then largely transacted by the defendant sons, a condition which thereafter progressively continuously increased; that advancing age weakened and impaired the father's mental faculties and judgment; that the defendant sons, taking advantage of the situation and especially of the confidential relations existing, succeeded in poisoning the mind of the aged father against the absent soldier son, and, as the fruits of the exercise of this undue influence, had on numerous and various occasions between the departure of Albert for the army and the death of the father in February, 1930, not only obtained the conveyances of April 4, 1929, in suit in this case, but secured for themselves that which in the end resulted in the acquirement of substantially all personal property owned by the father in his life, to the exclusion of plaintiffs herein.

It must be kept in mind, however, that in the instant case the issues framed by the pleadings relate exclusively to the real estate. The cancelation of the deeds in suit is substantially the sole relief sought by the plaintiffs.

At the trial of these issues in this case the defendants were called by plaintiffs as their witnesses. There is oral evidence given by the defendants, while testifying as plaintiffs' witnesses, which, if believed, fairly established that the execution of the warranty deeds in suit was solely due to the gratitude, affection and confidence of the grantors thereof to and in the several grantees named therein, and was made pursuant to a substantially constant and abiding scheme of the father for the distribution of his property; and which fully negatives the idea that any undue influence by or on the part of such grantees had been used "to confuse the will or control the judgment" of the grantors, and which also expressly negatives the use by the defendant sons with the father of any influence adverse to the plaintiffs or any of them.

Opposed to this the plaintiffs appeal to the record, which discloses that upon the commencement of proceedings in the county court of Lancaster county to probate the will of April 4, 1929, and after the commencement of the present action to cancel and annul the warranty deeds of that date, and notwithstanding the defendants were lifetime residents of Lancaster county, and at all times subject to the commands of process issued from its courts, the plaintiffs proceeded to take the depositions of the defendants, evidently for a purpose not embraced in the express words of our controlling statute. Later in the probate proceedings in the county court of Lancaster county the defendants were again called and testified as plaintiffs' witnesses. Still later on the trial of the instant case in the district court for Lancaster county the defendants were by plaintiffs called as their witnesses, and as such testified. On each of these three occasions the scope of the evidence covered appears to have been substantially the same. In addition, by the use of leading questions, accorded counsel

for the plaintiffs by the trial court in making their case in chief, these defendants, as plaintiffs' witnesses on this third occasion, were in fact, if not in form, subjected to a comprehensive cross-examination, which covered not only their then testimony, but embraced as well the statements contained in the prior depositions and the evidence given by them in the county court. Plaintiffs further insist that this evidence establishes an admitted relation of trust and confidence between the grantors and grantees at the time of the execution of the deeds. Admitting that defendants, having been called and testified as plaintiffs' witnesses, may not be impeached, plaintiffs now insist, however, that these witnesses, due to conflicting statements testified to by them on these respective occasions, stand so discredited as to deprive their evidence of its probative force and effect, and that therefore the burden of evidence imposed upon them by the existence of relations of trust and confidence with grantors has not been sustained. However, the rule appears to be: "Even though a witness is shown to have testified falsely in some respects, his testimony as to other matters concerning which he is corroborated by evidence of a credible nature should be considered, and may be believed." 40 Cyc. 2590.

There is no controversy as to the situation in the Blochowitz home prior to the World War, and that competency of the father at the commencement thereof is unchallenged, and the existence of fraud or undue influence therein is not charged.

In this situation, "The law, founded on a full knowledge and just appreciation of the general course of human affairs, indulges a strong presumption against any sudden change in the moral as well as the mental and social condition of man. When the existence of a person, a personal relation or a state of things is once established by proof, the law presumes that the person, relation or state of things continues to exist as before till the contrary is shown, or till a different presumption is raised from the nature of the subject in question." Lawson, Law of Pre-

sumptive Evidence (2d ed.) 229. See, also, 1 Moore on Facts, 517.

Upon this as an ultimate basis courts have almost uniformly adopted the conclusion that, where the issue is undue influence and testamentary incapacity, admission in evidence of former wills as tending to prove that the contested will, or other form of conveyance, was in substantial conformity with the testator's former expressed purpose, made at a time when his competency is unchallenged and the existence of undue influence is not charged, is approved. *Bowers v. Kutzleb*, 149 Md. 308; *Lindsey v. Stephens*, 229 Mo. 600; *Whisner v. Whisner*, 122 Md. 195; *Kerr v. Lunsford*, 31 W. Va. 659; *Hughes v. Hughes' Executor*, 31 Ala. 519; *Thornton's Exrs. v. Thornton's Heirs*, 39 Vt. 122; *Ross v. McQuiston*, 45 Ia. 145; *Payne v. Payne*, 97 W. Va. 627; *Barlow v. Waters*, 16 Ky. Law Rep. 426; *Love v. Johnston*, 34 N. Car. 355; *Sanger v. Bacon*, 180 Ind. 322; *Nieman v. Schnitker*, 181 Ill. 400; *Thompson v. Ish*, 99 Mo. 160.

An examination of the above cases discloses that, while some jurisdictions on the issue of undue influence hold as inadmissible the contents of a former will in support of a contestant, "where the terms of such will are variant from the will in suit" (*McCune v. Reynolds*, 288 Ill. 188), yet all the cases above cited are in agreement that, "In a will contest case the proponents may introduce a prior will executed when the testator's testamentary capacity was not questioned and which conforms substantially to the instrument contested, for the purpose of refuting charges of undue influence or want of testamentary capacity by showing that the testator had a constant and abiding scheme for the distribution of his property." *Pollock v. Pollock*, 328 Ill. 179.

True, in the instant case the final instrumentalities of conveyance made use of were warranty deeds, and not testamentary in character. But the vital questions remain the same. Then, too, in the recent case of *Holtman v. Lallman, ante*, p. 183, where the controlling questions

were, as here, the validity of a warranty deed and of certain gifts of personal property, attacked on the ground of undue influence and mental incapacity, and the district court admitted in evidence the provisions of a prior will of grantor, the discussion of the effect thereof, in the opinion of this court, by fair implication approves the action of the trial court.

It is to be noted that the wills of the decedent executed by him in 1903, 1907, and 1910, respectively, offered by the contestees, among other purposes, for showing his continuity of mind, were received in evidence without objection; their authenticity is unquestioned, and they are regular and in usual form. The formality of the execution of these instruments is not an issue in this case, and the testimony of the attesting witnesses thereto is unnecessary and immaterial. *Sanger v. Bacon,* 180 Ind. 322. Each of these wills, now in evidence as valid instruments, in view of the admitted facts before us, must be taken not only to establish, as of the date they were respectively executed, the state of personal relations between the testator and the devisees therein named and his then intentions with reference to the disposition of his property made thereby, but also to afford strong and persuasive evidence of the substantial and uninterrupted continuance thereof in all respects until each of such instruments was formally or actually superseded or revoked.

A deed procured by the exercise of undue influence upon the grantor may be set aside upon a proper and timely application of the party aggrieved. 18 C. J. 236.

Having these principles in mind, we now come to the consideration of the controlling facts on the issue of undue influence.

Rosalia Blochowitz, the mother, accepts the provisions for her support contained in the deeds, and in effect joins in the prayer that they be sustained. To the daughters, Lena M. Yankton and Anna Geistlinger, the wills of 1903, 1907 and 1910 provide identical legacies of $100 each, and no more. The will of 1929, executed substantially contem-

poraneously with these deeds, raised these legacies to the sum of $500 each. Their friendly relations to their father in his lifetime, as well as the constant and abiding scheme for the disposition of his property adopted by him, evidenced by all the wills now before the court, so far as they were concerned, wholly negative the possibility of undue influence in any manner affecting the provisions made in their behalf by the testator. Inequality of distribution of itself raises no presumption of the exercise of undue influence. *In re Estate of Stuckey,* 105 Neb. 641; *In re Estate of Kees,* 114 Neb. 512.

Indeed, courts of high standing recognize the fact that it is to be expected, and is not unnatural, but a common practice, for men of European birth to give the greater portion of their property to sons, particularly where the daughters are married. *Fortner v. Helgeson,* 188 Wis. 594.

Nor does the charge that the deed to the eldest son was tainted with undue influence or fraud find any substantial support in the evidence. Until attaining the age of 33 years this boy had been subjected unreservedly to his father's direction and absolute control. He had labored for his father continuously, receiving practically no compensation for his toil. There is no evidence of any break in the friendly relations between this son and the father, and in the record before us there is no possible question as to the steady, fixed purpose of Joseph Blochowitz in the matter of rewarding the eldest son in the manner effected by the deed executed here in suit. Indeed, the plaintiff son admits that he was informed by the father prior to the war, but after the 640 acres had been acquired, that each of the sons would receive a quarter section of land. By the terms of each of the wills of 1903 and 1907, Frank J. Blochowitz was devised a quarter section of the Lancaster county land. In the will of 1910 he was devised the S.E.¼ of section 14, township 8, range 5, which as to him remained in full force and effect until the execution by his father and mother of the deed to him in suit. In this questioned deed he receives this land last described, no more, no less, no other.

The admitted facts of the record thus effectually negative the operation of undue influence in the conveyance to Frank J. Blochowitz.

Nor do we find any lack of evidence in the record sustaining the deed of conveyance to John A. Blochowitz, the second son, whose age is 42. He, too, according to the admitted declarations of his father, was to receive a quarter section of the 640 acres then owned by the latter. The wills of 1903, 1907 and 1910 evidence the intent of the father that John was to receive the home place. This quarter section was valued by plaintiffs' witnesses at $125 to $130 an acre. By the warranty deed in suit herein there is conveyed to John, not the home place, but the N.E.¼ of section 14, township 8, range 5, which plaintiffs' experts value at $100 an acre. The testimony of Albert J. Blochowitz, hereinafter referred to, affords a convincing reason for this change, so that this transfer also may fairly be said to be substantially in accord with the long, fixed and continued purpose of the father evidenced by his admitted oral declarations, as well as by the provisions of the wills referred to. Aside from this, the comparative value of the two tracts in no manner indicates that an undue influence was exerted by or in behalf of John A. Blochowitz to secure the substitution of the land conveyed by deed for the land devised by the wills.

The warranty deed of April 4, 1929 in suit, conveys to George Blochowitz the "home place" and also the E.½ of the N.W.¼ of section 14, township 8, range 5. This comprises 240 acres. The 80-acre tract last described was devised to George in each of the father's wills of 1903, 1907, and 1910. With reference to intentions of the father as to the disposition of the "home place," the following appears in the record: Albert Blochowitz, testifying in his own behalf on his direct examination, speaks of what he calls "a will," which was exhibited or read to his mother, his brothers, and himself at the home place by his father "twenty or more years ago," and of the contents of this instrument says: "He (Joseph Blochowitz) had the will

made and he read it that each one of the boys should have 160 and the two that get places with improvements should have $5,000 less than those who get places without improvements." "He read it to us. He had the will right there, and the girls should have $500, and the balance should be divided. * * * They should have $500 where the boys get a quarter. Q. And all the other property be divided equally among the boys? A. Yes, sir." On cross-examination this witness testified that no particular piece of land was described in the will as being devised to any one; but that it provided with reference to the home place, "Well, the one that would stay at home would get the home place." He (Joseph Blochowitz) said "either the youngest or the one who was married last would get the home place." This witness also testified that he does not remember the provisions made in behalf of the mother; but that, after the will had been read and explained by the father, it was submitted to the sons and by them approved. It is quite possible, in view of the fact that the lands devised were not described or identified in the writing referred to, that the witness was mistaken in the character of the instrument submitted to them for consideration. No such will is in the record. The provisions, as testified to by him, are such as might well be embraced in a preparatory memorandum for the making of a will, but would hardly be found in the completed instrument as it would come from the hands of a competent draftsman. But, whether a will or a memorandum preparatory to making one, it evidenced the father's adopted plan, then declared by him at a time when his competency was unquestioned, and fraud and undue influence concededly absent, that under the situation as existing at the date of the deeds the youngest son should ultimately receive the family home.

But little or no support in the evidence is to be found sustaining the theory that a serious estrangement between the father and the plaintiff son occurred, growing out of, or because of, the latter's participation in the World War.

True, the father, while the conflict was still on, tried to secure Albert's release from military service, and at one time stated that "he had lots of work to do, and most generally when they go to war they never come back." And at another time said, "The war is bad business;" and at still another time, in a conversation concerning Albert's being then in the army, remarked, "It was bad; the boys are just spending money there; they spend too much money." He thought "they should not have any wages when they get their clothes and board, that ought to be sufficient." These different statements are all that plaintiffs' evidence discloses on this subject. We find no direct evidence, however, that the subjects of these remarks were ever referred to, discussed, or considerd by Joseph Blochowitz, after the war, save and except the unsupported testimony of the plaintiff son that once after his return, when he and his father were alone together, "he told me that John and Frank had told him that I was running around in France and spending all my money."

We may not approve of the father's efforts to deprive the nation in time of war of the military service of the son. Even so, this court would certainly be wholly unjustified in penalizing the entertaining and voicing of the views expressed by the father, and his instigation of the proceedings taken in behalf of the son, by, in effect, judicially depriving this father, and those similarly situated, of testamentary capacity and of the power to make such disposition of their property, accumulated by industry and thrift, as their judgment may dictate. Indeed, without criticism of the son, it may be said that it is undisputed in the record that he did write home from France for money, in addition to his army pay.

The evidence, however, is without contradiction that a serious disagreement did occur between the father and the plaintiff son in reference to a proposal that the father would, or should, turn over to this son a quarter section of the Lancaster county land which the latter should farm and improve. While it is not expressly stated in the record,

yet the uncontradicted facts sustain the inference that the same relations between the father and the plaintiff son were implied in this proposal that existed between the family and the other sons who had been given land to farm, and there is nothing which indicates that, had it been accepted, Albert would have been differently treated. But it was not accepted. It is patent that Albert desired a quarter section which it subsequently appears was then intended by the father for another son. He (Albert) was at the time of the consideration of the proposal refused any "papers" or assurance by the father that would guarantee him continued possession of, or ultimate title to, the land involved, but was advised that his brother John had the superior right thereto. Solely due to this fact, it seems, the son spurned the offer, and thereafter wholly withdrew from the communal family and from participation in its communal affairs. He thereafter conducted his business affairs on an individualistic and wholly independent basis. The other sons remained with the father and carried out and respected his plans and directions in the family affairs. This situation had continued almost ten years at the time of the execution of the deeds in suit. There is no testimony that any of the other sons were present at, or in any way participated in, or were connected with, the basic disagreement. The entire record, we feel, unmistakably indicates that the results of which the plaintiff son complains are due, not to any malign influence exerted against him by his brothers, but to the natural and inevitable effect of a nine year abandonment of the communal family enterprise, of which the father was the directing head. He, who for almost ten years ceased to contribute to the common enterprise and wholly withdrew therefrom, in conscience foreclosed himself of the right to expect equality of consideration by the father in the distribution of the avails thereof.

Plaintiffs introduced evidence as to the existence of fiduciary relations between the defendants and their father during the continuance of which, by transactions had between them, it is claimed, the father was divested of his

ownership of a large amount of bonds, mortgages and securities, and in which the same became the property of such defendant sons. It seems to be contended that this line of testimony not only establishes the nature of the relations existing between these parties, but sustains the charge that the real estate transfers were tainted by the exercise of undue influence on the part of the transferees. The evidence in the record, however, does not support this contention. In *Holtman v. Lallman, ante,* p. 183, wherein similar issues as questions of undue influence and fraud were presented, the pleadings embracing both conveyances of real estate and gifts of personal property, this tribunal determined the law, by implication at least, against plaintiffs' present contention, by sustaining the transfers of real estate and by setting aside the gifts of personal property. In the present case we are limited by the pleadings to the validity of the warranty deeds in suit. The source of the funds involved in these investments is not a matter of dispute. It is agreed that the father, from the beginning, appropriated and controlled all of the profits and proceeds of the 640-acre farm, a situation which was continued long after the sons had attained their respective majorities. It may be fairly deduced from the evidence that the fund was contributed to by Frank, George and John as late as the month of the father's death. The hope and inducement which from the commencement of the course of business was held out by the father to his sons was that the investments made by him were for their benefit, and in due time would become their own. The evidence of the banker from whom a large amount of the securities involved were purchased is, in substance, that the business was transacted by the father at his home. Personally he never went to the bank for that purpose, even in the earlier years. The members of the family, while quite often present during the negotiations, and to an extent participating therein, were his servants and messengers in the matters transacted, and simply carried out his decisions and directions with reference to the same. Joseph Blochowitz was always

the dominant controlling spirit in these matters, and, from all the evidence, it fairly appears that there was no change in the situation up to and including the last of these transactions, which took place a few days prior to his death. So, too, the transfer to, or placing of these securities in, the names of the several sons did not commence after the estrangement of Albert, but these promises made by the father to his sons, it is quite plain, were in the course of fulfilment long prior to 1917. Relating to this subject Albert testified in part: "A. He (Joseph Blochowitz) had been buying (securities) all the years I know before the war when I was home. I used to go with mother to the First Trust Company, and take the money for fat cattle, and take the money and put it in mortgages in John's or George's name, in mortgages for John and George. * * * Q. And sometimes in your name? A. Yes, sir; sometimes in mine."

It is also quite evident that as this division between the sons was carried out, both before and after the war, it was not made upon a per capita equality basis. It was a matter that rested wholly on the judgment of the father, who did not hesitate, by the exercise of parental authority, to change the situation at any time, even after legal title to the personal property involved had been fully vested in the donees.

It is quite obvious that, notwithstanding the advancing years and the delegation of certain matters to others, Joseph Blochowitz was, and ever continued, the master mind and the occupier of the relatively dominant position, and at no time, in comparison with his sons, could he be deemed the weaker party. The situation fully justifies the application of the rule that, "Even where the donor and donee stand in confidential relations, the presumption of undue influence arises only when the weaker party is the donor, being always against the party having the superior dominant position or control, though who was the dominant spirit is always a question of fact." 8 R. C. L. 1033, sec. 89.

Expressly negativing the intention to determine the validity of any of the transfers of personal property set forth in plaintiff's evidence, as between the respective parties thereto, we are still of the abiding opinion that, under all the circumstances disclosed by the record, they wholly fail to establish the exercise of undue influence over the father in the real estate transactions in suit.

Undue influence, whatever the technical definition thereof may be, must amount in effects accomplished to the destruction of the free agency of the grantor, and there must be proof that the deed was obtained thereby, and it must be shown that the circumstances of its execution are inconsistent with any hypothesis but undue influence, which cannot be presumed, but must be proved, in connection with the conveyance in suit, and not with other things. *Latham v. Schall,* 25 Neb. 535; *Seebrock v. Fedawa,* 30 Neb. 424, 438; *Boggs v. Boggs,* 62 Neb. 274, 284; *Ward v. Ward,* 86 Neb. 744, 748; *In re Estate of Dovey,* 101 Neb. 11, 18; *Stull v. Stull,* 1 Neb. (Unof.) 389, 392.

It follows, therefore, that the validity of the warranty deeds in suit is fully sustained by the evidence, and the trial court erred in adjudging them void.

The judgment of the district court is, therefore, reversed and the cause remanded, with directions to enter judgment in favor of defendants and against plaintiffs in conformity with this opinion, thereby confirming the several deeds in suit and quieting the several titles vested thereby; provided, however, that the district court is authorized to permit an amendment to the pleadings by the plaintiff Albert J. Blochowitz, if so advised, setting forth the alleged alterations of the warranty deed of April 4, 1929, in which he is named as grantee, to the end that issues thereon may be formed and such matter determined.

REVERSED.

ROBERT F. CASSENS ET AL., APPELLANTS, V. DORA WISNER ET AL., APPELLEES.

FILED JANUARY 29, 1932. No. 28064.

1. **Adverse Possession**: OCCUPANCY OF TENANT. In determining the rights of an adverse owner, the entry and possession of his tenant, expressly authorized to act, is the entry and possession of such owner.
2. ———. In obtaining title to ranch or grazing land by adverse possession, the tilling of a small portion thereof, the cutting of the hay from another portion thereof, and the pasturing of the entire remainder thereof, continuously year after year, by a duly authorized tenant, who lived in the same section and, for and on behalf of his landlord, had open, notorious, exclusive, and adverse possession thereof for more than ten years, is a sufficient possession in such owner to establish his title thereto.

APPEAL from the district court for McPherson county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

William E. Shuman and *R. H. Beatty*, for appellants.

Beeler, Crosby & Baskins, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and WRIGHT, District Judge.

PAINE, J.

This is an ejectment action to recover the title and possession of 80 acres of land in McPherson county, Nebraska. At the close of the trial the jury brought in a verdict finding that the defendants were the owners of the east half of the southeast quarter of section 13, township 17 north, range 30 west of the sixth P. M., McPherson county, and were entitled to the possession of the same. The jury were duly polled, at the request of the plaintiffs, judgment entered on the verdict, and the motion for a new trial was overruled.

It may be stated that, while the bill of exceptions is quite long, there is practically no question of fact in dispute in the evidence in this case.

The 80 acres in controversy in McPherson county, together with 80 acres lying immediately east, across the line in Logan county, were taken as a homestead by William S. Rowsey, and after living upon the 80 acres in Logan county the required length of time, and making proof thereof at the United States land office at North Platte, a patent was issued to him, but never recorded. In the record there appears the photostatic copy of the duplicate patent retained in the general land office, showing that it was issued July 12, 1894. At about this date the said Rowsey left, never to return, and the first heard of him was when he gave a deed to the 80 acres in controversy to Silas E. Clothier, in Powder River county, Montana.

Robert H. Cassens, the father of the two plaintiffs, made a homestead entry upon the northeast quarter of this same section of land in 1900, and the land to which the title is in dispute is the east half of the southeast quarter in the same section. At the time Cassens made the entry and settlement, the county was still very sparsely settled. Boundary lines were uncertain, and were not fixed definitely until the government survey was made in later years. It was an open range country. At the time Cassens made his homestead entry, in 1900, Rowsey had been gone for six years, his improvements had disappeared, and the small amount of land that he had broken out had gone back to native grass and sod. Cassens by mistake broke out and cultivated 12 acres of land upon the 80 in controversy, and, as the land lay open and unused, he cut hay upon it and pastured it each year for 12 years, as a trespasser, but he never made any claim to the title.

Dewey Wisner, a ranchman, residing 40 miles away, purchased a tax sale certificate upon this 80 acres upon February 4, 1907, which tax sale included all taxes back to 1895, the year after it was patented, at which time it was first placed upon the tax lists, and Mr. Wisner paid the taxes for each year up to the time of his death in 1926. Neither Wisner nor Cassens personally knew the original entryman upon the land, William S. Rowsey. This land

was light grass land, and 40 acres in the same section has always remained government land.

Five years after purchasing the tax certificate upon the land, Dewey Wisner wrote a letter to Cassens, in which he said he was paying the taxes upon this land, and asked Mr. Cassens to send him $14.42 for the use of the land for the years 1912 and 1913, and the letter Robert H. Cassens wrote in reply, upon December 13, 1912, reads as follows: "Inclosed please find $14.42 which is for the two years' lease on the W. S. Rowsey 80 acres of land, the years 1912 and 1913. *What would you take for this land and turn it over to me?*" Every year thereafter Cassens leased the land from Wisner or his widow, paying as high as $30 a year rental thereon. Wisner never saw the land but once, so far as the evidence discloses, and only then at a distance. A few years after he had been receiving rent for it, he came to the door of the Cassens home, in the same section, one evening, and asked where that 80 was that he was paying taxes on. "Q. What occurred then? A. Mr. Cassens pointed to it down east, and he stood there on the doorstep and looked in that direction. Q. Then, what did he do? A. He went away." These parties never met, so far as the evidence discloses, but upon two other occasions. The first time was when the Cassens drove 40 miles to see if they could buy the land. This was in October, 1918, when they had Jim E. Main drive them down to Wisner's ranch on the Platte river valley; and Mr. Main testifies that Mr. Cassens wanted to buy the 80 acres, and question No. 626 is as follows: "Q. You may state what was said between them; what Mr. Wisner said and what Mr. Cassens said. A. Mr. Cassens spoke to him about wanting to buy it. He said, 'I don't have it so I can sell it, yet.' He said, he figured on getting a tax title."

The last time they met was in cattle-branding time of the spring of 1926. Their son took them down to Wisner's ranch again, and they found Mr. Wisner out by the windmill, and talked about buying the 80 acres, but "he said he didn't consider he had any title to it yet, so we let it go at that."

Robert F. Cassens and Lloyd E. Cassens, the plaintiffs, are the sons of Robert H. Cassens, who rented this land from the year 1912 until March 1, 1929, there being correspondence and other exhibits in the bill of exceptions relating to this period of uninterrupted tenancy of 17 years. Silas E. Clothier, who had received a deed of the land from Rowsey, dated February 11, 1927, deeded the 80 acres in question to the two plaintiffs upon March 23, 1929, and their ejectment action is based solely upon their ownership under said deed. The petition was in the ordinary form used in ejectment. The answer pleaded, first, a general denial, and then set up that the defendants inherited the land from Dewey Wisner, who, it is alleged therein, entered into possession of this land on or about February 4, 1907, and continued in the open, notorious, exclusive, continuous, and adverse possession, claiming title thereto until his death, September 27, 1926. The verdict of the jury being for the defendants, the journal entry based upon said verdict found that the defendants were the owners and entitled to the immediate possession thereof.

Among the 12 assignments of errors, we find the appellants complain particularly of the giving of instruction No. 7, which reads as follows: "The jury are further instructed that, in order for a person to establish title to real property in this state by adverse possession, there must have been maintained, by the party asserting it, an actual, exclusive, continued, notorious and adverse possession of the premises under claim of ownership for the period of ten years by the person asserting it, or his tenant for him." Appellants claim that, by the addition of these last five words, the instruction became ambiguous, uncertain, and an incorrect statement of the law. The appellees insist that, what a man may do by himself in the matter of taking and holding real estate, he may do by another, and cite 2 C. J. 73. In *Lantry v. Parker*, 37 Neb. 353, being a quiet title case upon adverse possession, this court laid down the rule: "The possession of one's agents is, for the

purpose of the statute of limitations, the possession of the principal."

In the case of *Strom v. Hancock Land Co.*, 70 Or. 101, the first paragraph of the syllabus reads: "Possession by an agent is the possession of the principal, for the purpose of acquiring title by adverse possession, though the principal never personally occupied the land." This case seems never to have been cited in Shepard's Citations, although it is directly in point. The appellants, in their reply brief in discussing this case, call attention to the fact that Mrs. E. Ryan, the adverse claimant, caused her tenant to erect a fence inclosing the land, and there was no such inclosure in the case at bar. Appellants also cite the case of the *Omaha & Florence L. & T. Co. v. Parker*, 33 Neb. 775, which holds: "To entitle a party to claim by adverse possession, he must have made an actual entry upon the land and occupied the same as owner. This occupancy, however, may be continued by his agents." The evidence discloses that in that case the parties claiming the land actually took possession of the land themselves and then placed tenants in possession, and we do not understand that the supreme court held in that case that it would be impossible to take possession of the land in the first place by and through a tenant.

Possession of a tract of land by an agent or tenant under adverse holding inures to the benefit of the adverse holder. Personal occupation in such a case is unnecessary. *Lantry v. Parker*, 37 Neb. 353; *McComb v. Saxe*, 92 Ark. 321; *Strom v. Hancock Land Co.*, 70 Or. 101; *Abel v. Love*, 81 Ind. App. 328. And it is held in *Pearce v. Wright*, 284 Ill. 221, that on the issue of adverse possession through a tenant it is immaterial whether the leases were written or verbal. "Possession through a tenant or agent is of course sufficient actual possession to support the claim of adverse possession." Tiedeman, Real Property (3d ed.) sec. 493.

We hold that the weight of authority supports the doctrine that the possession of a tenant, who entered by ex-

press right of a person who claimed to be the owner of the land, is the entry and possession of such owner. Under this view, the instruction complained of properly states the law of the case.

It is contended that in this case the possession was not notorious, nor was the boundary sufficiently defined. In closely settled communities it has been held that a substantial inclosure of the land is necessary, and that disseisin only extends to land so inclosed, and a right of ingress thereto. However, the rule cited does not apply to the open ranch or grazing land of the short-grass country. A clandestine use of land, of so secret a character that the owner would not notice it if he investigated, would not be sufficient. But, if the making of turpentine amounts to a sufficient possession of pine land (*Royall v. The Lessee of Lisle,* 15 Ga. 545) certainly the putting up of hay in the hay flats, and the pasturing of the shorter grass, and the plowing and tilling of a portion thereof, even if it was not all inclosed, would put an ordinarily prudent owner on notice that an enemy had taken over possession of his land, especially if the man claiming to be in possession by his tenant had paid the taxes thereon continuously for a period of approximately 30 years. *Holtzman v. Douglas,* 168 U. S. 278; *Stetson v. Youngquist,* 76 Mont. 600; *DeWulf v. DeWulf,* 104 Neb. 105; *Twohig v. Leamer,* 48 Neb. 247; *Lewon v. Heath,* 53 Neb. 707; *Kuh v. Flynn,* 108 Neb. 798; *Lantry v. Parker,* 37 Neb. 353.

The continuous, open, notorious, exclusive, and adverse possession of an 80-acre tract of land by pasturing the lighter portion thereof, and by mowing the grass long enough to make hay, and the tilling of a small portion thereof each year for more than 10 years, by and through a tenant, is sufficient to constitute adverse possession thereof.

There being no error in the record, the judgment of the district court is hereby

AFFIRMED.

FIRST NATIONAL BANK OF ALLIANCE, APPELLEE, V. PRUDE BROYLES: WILL HOLLSTEIN, APPELLANT.

FILED JANUARY 29, 1932. No. 28102.

Judgment: CONTROL OVER DURING TERM. During the same term of court at which a cause is tried, the district court, on its own motion, may set aside the verdict of the jury, and enter judgment for the adverse party, when the pleadings and the evidence will sustain no other judgment.

APPEAL from the district court for Sheridan county: EARL L. MEYER, JUDGE. *Affirmed.*

E. D. Crites and *F. A. Crites,* for appellant.

R. O. Reddish, contra.

Heard before GOSS, C. J., EBERLY and PAINE, JJ., and BEGLEY and ELDRED, District Judges.

PAINE, J.

This is an action in conversion. On August 18, 1930, plaintiff, First National Bank of Alliance, filed its petition in the district court for Sheridan county against one Prude Broyles and Will Hollstein for the conversion of 77 head of hogs of the then market value of $1,354.90. The petition sets out a chattel mortgage, in the principal sum of $1,898.21, executed by defendant Broyles to said plaintiff, and dated April 27, 1929. Said mortgage was not filed with the county clerk of Dawes county until June 22, 1929.

Conversion is alleged to have taken place at the town of Hay Springs, Sheridan county, on September 20, 1929; the mortgage, by its terms, matured September 1, 1929, and covered 270 head of animals, and small grain. The following payments were admitted: June 20, 1929, $276.89; October 2, 1929, $300; November 30, 1929, $436.65; February 21, 1930, $125; total, $1,138.54; and the petition claims damages resulting from said alleged conversion in the sum of $831.75.

The appellant, Will Hollstein, alone answered. He admitted the purchase of 77 hogs from Broyles at Hay Springs, and the payment of their full value of $1,354.90;

denied that he had any knowledge of the existence of a chattel mortgage on the hogs; alleged that Broyles paid appellee $600 of the proceeds of said sale upon October 2, 1929, and that at that time appellee knew of the sale and ratified and confirmed the same. The jury rendered a verdict February 12, 1931, against Broyles for the full amount, as he had made no defense, but found for the appellant, Hollstein, no cause of action.

Without ruling upon the motion for a new trial filed by the appellee, the court, upon its own motion, at the same term of court, upon May 28, 1931, set aside the verdict of the jury, and entered a judgment against appellant, Hollstein, for $831.75, who thereupon filed a motion for a new trial, and the court then decided that appellee should file a remittitur of $225.75, which was done. The appellant's motion for a new trial was thereupon overruled, and a judgment entered against him for $607.

The appellee was paid $600 of the proceeds from the sale of the hogs, but applied a portion thereof upon another note than the one secured by the hogs, and the court rightly decided that the appellant was entitled to have the entire amount credited on the note of $1,898.21, which left a balance due thereon of $607, so the court required the remittitur to be filed.

The principal contention is that the trial court erred in setting aside the verdict for appellant, and upon its own motion entering a judgment, notwithstanding the verdict.

District courts have ample power, even upon the court's own motion, if satisfied that an error has been made, to set aside a verdict of a jury in favor of one party and enter a judgment in favor of another party, during the same term of court when the pleadings and the evidence will sustain no other judgment. Such absolute control may be exercised, within the sphere of sound discretion, as an inherent right, independent of every statute, derived from the common law. *Netusil v. Novak*, 120 Neb. 751; *Colby v. Maw*, 1 Neb. (Unof.) 478. This has also been done where the motion for a new trial had not been filed

in time, and the court acted, as it had a right to do, upon its own motion. *Young v. Estate of Young*, 103 Neb. 418; *Bradley v. Slater*, 58 Neb. 554; *Kirshenbaum v. Massachusetts Bonding & Ins. Co.*, 107 Neb. 494.

The appellant made no effort to ascertain whether the hogs were mortgaged, he did not even inquire of the seller, or inspect the records. The testimony of Frank Abegg, president of appellant bank, is clear and positive, and, with the other evidence, establishes the fact that the sale was made without the knowledge or consent of appellee. We find no error in the record, and the judgment of the trial court is

AFFIRMED.

CLERMONT CRAVAT COMPANY, APPELLEE, V. HERSCHEL A. ECKHARD ET AL., APPELLANTS.

FILED JANUARY 29, 1932. No. 27878.

Fraudulent Conveyances: APPEAL: AFFIRMANCE. The case is ruled by well-settled principles of law and, upon an examination of the record, the findings of fact and judgment of the trial court are approved.

APPEAL from the district court for Saline county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Burkett, Wilson, Brown, Wilson & Van Kirk, for appellants.

F. L. Bollen, contra.

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and BLACKLEDGE and MESSMORE, District Judges.

BLACKLEDGE, District Judge.

This action was instituted in the district court for Saline county by the plaintiff, appellee, for the purpose of setting aside a conveyance of a business lot and property situated in Friend, Nebraska, made by Conrad C. Eckhard to his three children, Herschel A. Eckhard et al., defendants herein, upon the ground that such conveyance was made in fraud of creditors, including the plaintiff.

The case is ruled by well-settled principles of law and the matters for determination are questions of fact. For an understanding of the situation as it is disclosed by the record, a brief résumé must be given of the material facts, and this will be done without extensive quotation of particular testimony, but by giving in condensed form the salient features of it sufficiently to illustrate the conclusion necessarily reached.

Conrad C. Eckhard had been a merchant engaged principally in the men's clothing business operating a number of different stores and during a portion of the period as many as three stores at the same time. These stores were located at Lexington, Geneva, and McCook, Nebraska, Atwood, Kansas, and Holyoke, Colorado. Also during a part of the time he undertook to develop at Friend, Nebraska, a plant for the manufacture and promotion of an automatic egg turner for an incubator company, in which he lost some $16,000; also during the time he made investments in a tract of 160 acres of land in Brown county, South Dakota, and an interest in a tract of some 400 acres near Holyoke, Colorado. He also owned a residence property and a store building in Friend, Nebraska, which is the property in controversy herein, and was engaged there in the general mercantile business. His wife, Cora Isabelle Eckhard, mother of the children, died at Friend in 1920. He continued to reside at Friend until shortly before November, 1924, at which time he remarried, and thereupon took up his residence in Denver, Colorado, where he continued to reside until the time of trial. The children did not go with him to Denver, but remained at Friend, Nebraska, in care of an aunt, Amelia Bulwan, occupying the residence property, of the value of approximately $5,000, at Friend, which property was before his second marriage deeded by him to Mrs. Bulwan and the two younger children; also about the time of his second marriage he sold his business at Lexington and at Friend, liquidating most of his indebtedness of $16,000 to the First National Bank, the balance being liquidated from the sale of his business

at Geneva. This left him operating a store at Atwood, Kansas, and at Holyoke, Colorado, and he was engaged in a sort of jobbing business in neckwear, operated from his residence in Denver, in which he had a small amount, two or three hundred dollars, invested; he also yet retained his South Dakota land which, however, was mortgaged for $3,500 to the Merchants & Farmers Bank at Friend, and an interest with four others in the land near Holyoke in which he states he had invested about $4,000. These investments had been made during the war period, about 1917 and 1918.

The foregoing, with the additional fact that, during the summer and fall of 1926, domestic trouble developed between Conrad C. Eckhard and his then wife, which reached its climax about the following February, and in which some sort of a separate maintenance decree, which is referred to but not clearly disclosed by the evidence, was rendered in the Colorado court, fairly shows the debtor's situation, as disclosed by the record at the time of the transactions immediately involved.

The deed of conveyance which is in controversy here was prepared at Friend, Nebraska, and bears date June 16, 1926. It is not witnessed and was acknowledged in Yuma county, Colorado, July 1, 1926, at about which time it was transmitted by mail by Conrad C. Eckhard to the Merchants & Farmers Bank at Friend apparently without any letter of instructions, received at the bank, placed in its file for safe-keeping, and there remained until about February 17, 1927, when, pursuant to a telegram from Conrad C. Eckhard to Mr. Nunemaker of the bank, the deed was forwarded to the recorder's office for record, was there recorded February 21, 1927, and returned to the bank. There is no direct evidence as to how or when the deed later got out of the possession of the bank. It was produced on behalf of defendants at the taking of the deposition of Conrad C. Eckhard in Denver on October 26, 1929. The only additional information as to the subsequent handling of the deed is what may be inferentially drawn

from the statements of Mr. Nunemaker in his testimony, that it was returned to them after recording, that he had no recollection how long they kept it after that, and "Q. What did you do with it finally? A. I don't remember whether—I think I delivered it to you, didn't I, Herschel?" Herschel, the son, later testified in the case, but neither he nor any one else makes any explanation of the actual disposition of the deed.

The indebtedness for which plaintiff's judgment was recovered was incurred for the purchase of merchandise by Conrad C. Eckhard in early October, 1926.

The defense raises two propositions: First, that there was a delivery of the deed at the time it was acknowledged and sent to the bank at Friend; second, that there was a trust created as between Conrad C. Eckhard, his former wife, and the children in fulfilment of which this conveyance was made.

The trust is claimed to arise from the fact that the first Mrs. Eckhard received from her father's estate, which was closed in Saline county in June, 1919, an inheritance of approximately $4,000, and that this money or part of it was invested in the property in controversy. She was afflicted with cancer and knew that she was soon to die. Upon an occasion at the table at meal time, about two weeks before her death, at which her husband, Amelia Bulwan, and the son, Herschel, were present, there was a conversation which is related by Mrs. Bulwan as follows: "A. Well, she wanted—she told him she would let him have that money, but she always wanted to have her children benefit from it. Q. Was anything said with reference to the store building in Friend in particular? A. Yes; she wanted the children to have that and the home so that they would always have something to live on. Q. What did he say? A. Well, he said he would fulfil her wishes."

The son, Herschel, in reference to the same matter, says: "Mother was greatly worried that at any time if Dad should remarry that things wouldn't go so well, and she asked that all her property, or all the money should be

turned into an investment that would protect the two children; she figured at that time that I was out of school that I should have my share, but I didn't need the protection that the other two did, and they should have income property that would protect them, and also that the house should be left to the children."

Conrad C. Eckhard tells it as follows: "A. She asked me to deed this building and also the home at that time to the children for what I owed her, and she deeded this bank stock to me at that time also; and I was to reimburse the children. She said she would feel a great deal better if I would deed the home and the building to the children. Q. Did you deed the home and the store building? A. I did not at that time because I felt I was fairly well heeled and secure, and did not think it was particularly necessary at that time to do it. * * * Q. And you were to deed this property for the money? A. For what I had gotten from her. She said I had enough anyway and she would feel a great deal better inasmuch as it was her estate if I would do that, and I agreed to do it." He also testified, in reference to this money, that she loaned it to him and he used it. He could not say positively whether this money was actually put into the building, but at her death the question came up. "She had also some bank stock in the Dorchester bank, and she signed this over to me to take care of the children, to afterwards give the children, and she also asked me for the money that I owed her or to deed the children the building for their protection." He did not do so at that time and did not think it necessary because at that time he had plenty of property and was not married. She did not have any property in her name except the stock of the Dorchester bank. They did not keep separate accounts. He did not give her any note. She just simply gave it to him and he deposited it to his own credit. She loaned it to him. She said she wanted it understood that it was hers and that she could have it whenever she wanted it.

The foregoing references fairly reflect the whole testi-

mony upon that proposition of the only persons, three in number, who claim to know anything with reference to the alleged trust agreement. They were all members of the same family, and when it is recalled that this conversation is claimed to have taken place early in 1920 and that nothing was done toward carrying out the claimed oral agreement as to this particular property until some six years later, it is clear that the evidence produced falls far short of that necessary under such conditions to establish any such trust.

It is further to be observed, in reference to the deed and the circumstances surrounding it, that it is neither attested by a witness nor joined in by the wife of the grantor; that the Dorchester bank stock which is the only property shown to have ever been in the name of the first wife had been prior to her death transferred to Conrad C. Eckhard and at this time, in June, 1926, he sold the bank stock and testifies that he took the money to Wray, Colorado, and there with it took up a note that he had at a bank, and acknowledged the deed and sent it back to Friend. He testifies he does not know why he did not acknowledge the deed sooner, or why it was not recorded sooner, and that he did not have any reason at the time for not recording it and does not know why it was not recorded promptly. The son, Herschel, testifies that this was shortly after they had disposed of the business in McCook and that he had trouble there with the father's second wife because of her interference with that business. He also states that he and the father talked over the matter of recording the deed, and that the father said that it would just cause a fight for him and that he would prefer that it be not recorded. When asked further as to why the deed was later recorded in February, 1927, he stated that the second wife had sued his father for separate support and maintenance in Denver in a case which she won and he was to make certain provisions for her support and pay an amount for her separate maintenance. It is further made clear from the evidence that business affairs for

Conrad C. Eckhard which had been going badly were not going better, and that about this same time he was closing out and did close out his store business at Holyoke by auction and from the whole thing netted some fifty or sixty dollars. His business at Atwood after having suffered the levy of attachments, and in reference to which he made an assignment, was closed out and he realized nothing. The land near Holyoke never had produced any income and from its closing out he realized $200, which he was glad to get. The land in South Dakota was foreclosed and he realized nothing from it. He had just before his second marriage conveyed the home property in Friend for the use and benefit of his minor children, which so far as is disclosed they still have and which amounted in value to more than the money received from his dead wife's estate. Thereafter so long as he was able he caused to be contributed from his stores at Geneva, Atwood, and Holyoke an amount for the support of his children, who were in the care of Mrs. Bulwan. The record presents a perfect picture of a failing and insolvent debtor trying to save something from the wreck, but it wholly fails to support the theory either that there was a trust established in the property sought to be conveyed or that there was a delivery of the deed prior to its recording in February, 1927. The trial court found that the deed was not delivered until on or about February 21, 1927, and after the indebtedness, which is the foundation of plaintiff's judgment, was incurred, that the plaintiff was an existing creditor, that the deed was without any consideration moving from the grantees and was in fraud of the plaintiff's rights as a creditor and should be canceled and set aside. The evidence amply sustains the findings of the trial court, which are approved and adopted by this court, and the judgment of the trial court is

AFFIRMED.

THOMAS J. MCQUIN, ADMINISTRATOR, APPELLEE, V. MISSOURI PACIFIC RAILROAD CORPORATION ET AL., APPELLANTS.

FILED JANUARY 29, 1932. No. 27833.

1. **Railroads**: AUTOMOBILE DRIVER: DUTY AT CROSSING. "It is the positive duty of an automobile driver approaching a railroad crossing where there is a restricted vision and where he is familiar with said crossing and its surroundings to look and listen at a time and place where looking and listening will be effective; and failure to observe this rule without reasonable excuse therefor is negligence." *Kepler v. Chicago, St. P., M. & O. R. Co.*, 111 Neb. 273.
2. ———: ACCIDENT AT CROSSING: CONTRIBUTORY NEGLIGENCE. Evidence examined, and *held* not to warrant us in holding, as a matter of law, that plaintiff's intestate was guilty of such contributory negligence as would bar a recovery.
3. ———: ———: WARNING SIGNALS: ROADS NOT DEDICATED AS HIGHWAYS. Section 74-562, Comp. St. 1929, requiring that a bell shall be rung or a whistle blown by locomotives at a distance of at least eighty rods from the place where the railroad shall cross any road or street and be kept ringing or whistling until it shall cross such road or street, applies as well to roads in fact used by the public though not dedicated as public highways as to those so dedicated. Under the facts stated in the opinion, *held* that the road crossed by the railroad at the place where the collision occurred was a road in fact used by the public, and that it was the duty of the defendant railroad company as its train approached the crossing to have rung the bell or sounded the whistle as required by said statute.
4. **Negligence and Contributory Negligence**: QUESTIONS FOR JURY. On the question of negligence and contributory negligence, the facts in this case are such that different minds may reasonably draw different conclusions therefrom and were for the jury and not for the court to determine.
5. **Railroads**: ACCIDENT AT CROSSING: DUTY TO PROVIDE FLAGMAN. In the absence of statutory regulation requiring it, the failure of a railroad company to have a flagman or watchman at a crossing will not warrant a jury in finding negligence on the part of the railroad company, unless there is evidence that such crossing is rendered more than ordinarily hazardous and dangerous by the conditions surrounding the same, and that the ordinary signals may be ineffective to warn travelers of the approach of a train. *Held*, under the rule stated, the evidence was insufficient to warrant a finding by the jury of negligence

for the failure of the defendant railroad company to have a flagman or watchman at the crossing where the accident occurred, and the giving of an instruction submitting such issue to the jury was error.

6. **Trial**: INSTRUCTIONS. Where the court by an instruction submits an issue to the jury and later by another instruction given at the request of the defendants withdraws such issue, this court will not reverse the case on account thereof, where it appears the jury were not misled thereby to the prejudice of the defendants.

7. **Courts**: CASE REMANDED TO STATE COURT FROM FEDERAL COURT. Where a federal district court has remanded to the state court a cause theretofore removed therefrom, no state court has power on appeal or otherwise to review such order of the federal court. By such an order of remand the state court is reinvested with jurisdiction and may rightfully proceed as if no removal had ever been attempted.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Reversed.*

Kennedy, Holland & DeLacy and *W. G. Kieck*, for appellants.

C. A. Rawls and *Brogan, Ellick & Van Dusen, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and LOVEL S. HASTINGS, District Judges.

HASTINGS, District Judge.

This action is brought by Thomas J. McQuin, as administrator of the estate of Clifford J. McQuin, against the Missouri Pacific Railroad Corporation and H. F. Kilmer, as defendants, to recover damages growing out of the death of Clifford J. McQuin, due to a collision between the automobile he was driving and a freight train of defendant railroad company which was being backed over a railroad crossing. The defendant Kilmer was a brakeman taking part in the operation of the train. From a judgment for $6,000 on a verdict of the jury the defendants have appealed.

The acts of negligence alleged by plaintiff and submitted to the jury were: That the train of the defendant rail-

road was being operated without any headlight or other light on any part of the train that was visible from the direction toward which such train was moving at the time; without any person on said crossing to warn travelers upon said highway of the approach of said train to the crossing; without giving any warning by light, bell or whistle or otherwise of the approach of said train to said crossing; and without keeping and maintaining a lookout for travelers approaching or about to pass over said crossing.

Defendants alleged contributory negligence on the part of plaintiff's intestate, in that he failed to look and listen for the approaching train at a point where looking and listening would have been effective, and that in the exercise of reasonable care ought to have known that a train was approaching and that he would be struck if attempting to cross in front of the same.

The collision occurred about 1 o'clock in the morning of March 21, 1930, about one-half mile south of the Village of Union, in Cass county, on a crossing of the defendant railroad.

It appears from the evidence that a main traveled highway parallels the railroad tracks for about a half mile south of Union, where the main highway turns to the east and away from the railroad tracks. From that place, there is a road leading from the main highway west, which crosses the railroad track about fifty feet west from where the main highway turns to the east. Where the road going west crosses the railroad track, the defendant company maintained the usual public crossing with the usual crossing sign and cattle guards at the south end. This road is entirely unobstructed until about fifty feet west of the railroad tracks where there is a large iron gate in the right of way fence. The road extends from that point west about one-eighth of a mile and then about one-eighth of a mile south to the home of one Wencel, where it terminates.

The crossing was constructed by the defendant railroad more than twelve years prior to the accident. The road

in question, although it was not a regularly laid out highway, had been in use for many years prior thereto, and at least from the time the crossing was established had been open for public travel and accommodated a portion of the traveling public.

At the point where the road crosses there are two tracks, the east track, being the main line track, and the west track, referred to in the evidence as the passing track. The tracks run southeasterly. Fifteen hundred fifty-four feet southeasterly of the crossing is a switch which connects the passing track with the main track. The distance between the west rail of the main track and the west rail of the passing track is thirteen feet and ten inches. It was the custom of the defendant company to leave cars on the passing track between the crossing and the switch that were to be taken up later by trains going south on the main line.

On the night of the accident, the decedent, Clifford J. McQuin, in company with George Kennison, Wymore Fletcher, and Donald McQuin, had gone from Union in a five passenger sedan to the home of Mr. Wencel, where they stayed until nearly 1 o'clock. When they left for home the decedent was driving the car, with George Kennison seated at his right in the front seat, and with Wymore Fletcher and Donald McQuin riding in the back seat; Fletcher riding on the right side and McQuin on the left side. The night was partly cloudy and dark; the headlights of the car were lighted. From the Wencel place they drove north and then east. In driving along the east road, they saw no lights and heard no noise that might indicate the presence of a train, but from the reflection of the automobile lights saw some box cars on the passing track. They continued on east and drove through the gate at a point about twenty-five or thirty feet west of the west rail of the passing track and about half of the distance between the gate and said track, where the car was stopped. Kennison got out, leaving the right door open, and went back to close the gate, which they had left open

when they went over to Wencel's place earlier in the evening. After Kennison closed the gate decedent asked him if he saw or heard any train. He looked and listened and stated that he could neither hear nor see any train south of the crossing; that all he could see was a part of a string of box cars, but it was so dark that he could not see how far they extended south and east; that he thought he heard a train coming into Union from the north, but could not see it. Fletcher and Donald McQuin both testified that they looked and all that they could see was a part of the string of box cars, and they could not tell how far they extended south, but estimated that the north end of the cars was within fifteen or twenty feet of the crossing, and, although they looked and listened, there was nothing to indicate the presence of a train south of the crossing. Kennison, Fletcher and Donald McQuin all stated positively that they heard no sound of a whistle or of a bell ringing or of the movement of a train south of the crossing, and that, had the bell been ringing or the whistle sounded, they would have heard it. Kennison got into the car and the decedent drove the car from there on to the point of the collision at about four or five miles an hour. When the front of the automobile was just over the west rail of the main track, Fletcher and Donald McQuin saw the north end of a box car within five or six feet of them; there was no light upon the box car that they could see and all that they could see was a dark object coming toward them. When they saw the box car within that distance it was too late to avoid the accident. Donald McQuin and Fletcher further testified that during the time they were proceeding from the place where they had stopped to the point of the collision the decedent was facing towards the east, and that they did not notice him turn his head either to the right or to the left. All of the occupants of the automobile were familiar with the crossing.

The train involved in the collision arrived from Lincoln in Union at about 12:45 a. m. The caboose was left at Union and the conductor and a brakeman remained there,

leaving the engineer, fireman and the head brakeman on the train. The defendant Kilmer, as head brakeman, was controlling the movements of the train. The train, consisting of the engine and twenty-nine box cars of the standard length of about forty-two feet each, proceeded south on the passing track, across the crossing, and left twenty-seven of the box cars on the passing track between the crossing and the switch. The train, then consisting of two box cars and the engine, started back toward Union on the main track with the box cars in the lead.

The brakeman, the engineer and the fireman testified that when they started backing toward Union the headlight was lighted and there was also a headlight on the back of the engine; there was no light on the north end of the lead car. The brakeman was sitting in about the middle of the lead car with a lantern that he used for signaling. It is the testimony of the trainmen that when they started back the engineer blew the whistle and started the automatic bell, and that the bell was ringing from that time on until the time of the collision. The brakeman and the engineer testified that as they were backing up they noticed a light at the crossing but assumed that it was from a fire lighted by hobos. The brakeman then claims that he gave the engineer the signal to slow down, that the engineer responded by slowing the train, and that very shortly thereafter they both observed that the lights were from an automobile which appeared to be standing a short distance to the west of the tracks at the crossing. The engineer, assuming that the person or persons at the automobile had either seen or heard the train and were waiting for it to pass the crossing, increased the speed of the train to about ten miles an hour. Both testified that at the time they first saw the light, which they supposed to be from a fire started by hobos, they were to the east of the string of box cars, and that when they observed that the light was from an automobile they were at or a little past the north end of the string of box cars on the passing track. They testified that when within about three cars length of the cross-

ing the automobile suddenly started up and proceeded to cross the crossing; that the brakeman immediately gave the "washout" or stop signal, the engineer applied the brakes and attempted to stop the train, but it was too late and the lead box car collided with the automobile driven by decedent. The engineer also testified that after the collision he stepped the distance between the crossing and the north end of the string of box cars and found the distance to be one hundred fifty feet. The foregoing is a substantial summary of the evidence adduced by the parties relating to the facts and circumstances surrounding the collision.

On the facts stated, it is contended by counsel for the appellants that, had the decedent looked and listened at the time and at the place where looking and listening would have been effective, he could have seen or heard the approach of the train, and that failing to do so he was guilty of more than slight contributory negligence in comparison with the negligence of the defendants, and that this cause should be reversed and dismissed. It is the settled law of this state that:

"It is the positive duty of an automobile driver approaching a railroad crossing where there is a restricted vision and where he is familiar with said crossing and its surroundings to look and listen at a time and place where looking and listening will be effective; and failure to observe this rule without reasonable excuse therefor is negligence." *Kepler v. Chicago, St. P., M. & O. R. Co.*, 111 Neb. 273. See *Rickert v. Union P. R. Co.*, 100 Neb. 304; *Askey v. Chicago, B. & Q. R. Co.*, 101 Neb. 266; *Seiffert v. Hines*, 108 Neb. 62; *Haffke v. Missouri P. R. Corporation*, 110 Neb. 125; *Stanley v. Chicago, R. I. & P. R. Co.*, 113 Neb. 280; *Tyson v. Missouri P. R. Corporation*, 113 Neb. 504; *Allen v. Omaha & S. I. R. Co.*, 115 Neb. 221; *Moreland v. Chicago & N. W. R. Co.*, 117 Neb. 456; *Lewis v. Union P. R. Co.*, 118 Neb. 705; *Eggeling v. Chicago, R. I. & P. R. Co.*, 119 Neb. 229; *Belz v. Chicago & N. W. R. Co.*, 119 Neb. 312.

In the cases cited it appears that the accidents occurred in daylight and, had the drivers of the cars or vehicles looked and listened effectively, they could have prevented the collisions.

In the instant case a different situation is presented. The accident happened on a dark night, the decedent stopped his car within forty feet of the main track and seemingly exercised caution, in that he was not trusting alone to his own observation and hearing, but requested the person out of the car to look and listen. The door of the car was open and the other occupants of the car looked and listened and saw or heard nothing to indicate the presence of a train southeast of the crossing. It will not be presumed that the decedent could have or did see or hear more than the others. In driving from that point to the place of the collision the track to the southeast would be under decedent's observation as much as under the observation of the other occupants of the car, and they saw or heard nothing to indicate the presence of the train as they moved eastward, although they were looking and listening. At the time that they stopped and looked and listened the train must have been a short distance southeast of the cars upon the passing track.

It is insisted by counsel for the appellants that they should have heard the rumble of the train had they been listening attentively. It is quite evident that the engine and two cars traveling at a speed of about ten miles an hour would, ordinarily, not make any appreciable noise. The movement of the train was toward them, with no light on the rear end of the lead car. It might well be that they would be unable, on account of that fact, to see any part of the light from the headlight of the engine or the light on the tender thereof. The brakeman was sitting in such a position on the car that under the situation existing the light from his lantern might not have been visible to them.

As heretofore pointed out, the distance from the west rail of the passing track to the west rail of the main track

was thirteen feet and ten inches and the distance between the two rails of the passing track was about four feet and eight inches, which would leave a space between the west rail of the passing track and the east rail of the main track of about nine feet, approximately the length of the automobile. Furthermore, the cars on the passing track would extend out over the rail about eighteen inches, while those on the main track would extend out the same distance, leaving about six feet clearance between the cars on the passing track and the cars on the main line, so that no one, no matter how attentively he was looking, might be able to distinguish the cars on the main line track from the box cars on the passing track. After the train had passed the cars on the passing track, the distance would only be about seven and a half feet between the cars on the main line and the east rail of the passing track. The train moving toward the crossing past the cars on the passing track might, under such circumstances, look like a continuation of the cars on the passing track. The distance between the north end of the cars on the passing track and the crossing is shown to have been one hundred fifty feet by the testimony of the only person who measured the distance. The cars on the passing track being that distance from the crossing, it appears that the place where the decedent stopped his car was as advantageous a place to look and listen effectively for the approach of a train from the southeast as any point between there and the main line track. From where he did stop, look and listen he could be as sure whether a train was dangerously near as at any other place between there and the place where the collision occurred.

Counsel for appellants contends that under the evidence it was the duty of the decedent to have got out of his automobile and gone to a point where the train on the main line track could be seen or that he have some one of the other occupants of the car do so, and not having taken such precaution he went upon the crossing at his own risk. In support of that contention counsel insists

that the facts in this case bring it within the rule announced in the case of *Baltimore & Ohio R. Co. v. Goodman*, 275 U. S. 66, wherein it is held (48 Sup. Ct. Rep. 24):

"Where, because his view of railroad tracks is obscured, a driver of an automobile cannot be sure otherwise whether a train is dangerously near, he must stop and get out of his vehicle, in addition to merely stopping and looking, and if he relies on not hearing train or signal, and takes no further precaution, he goes on crossing at his own risk."

In those jurisdictions where the rule contended for prevails it has its limitations and the courts in such jurisdictions have refused to apply the same in many instances on facts which were not as favorable to the party against whom they were invoked as they are in this case. Illustrations are given in a note on that subject in 56 A. L. R. 652, 653. Obviously, for the reasons heretofore stated, the rule contended for does not apply to the facts in this case.

The facts disclosed by the evidence are not such as warrant us in holding, as a matter of law, that decedent was guilty of such contributory negligence as would bar a recovery. It was for the jury to determine, from the evidence, whether the decedent exercised that reasonable care for his own safety that an ordinarily prudent man would have exercised under the existing circumstances and conditions.

Appellants assign as error that the evidence is insufficient to show that they were guilty of any negligence. The principal contention in that regard being that the accident did not happen at a public highway crossing; that the road was a private road, in that it was a *cul-de-sac* and traveled by only a limited number of persons, and that not being a public highway no duty was imposed upon the defendant railroad company by section 74-562, Comp. St. 1929, to have rung a bell or blown a whistle continuously in approaching said crossing with its train. That statute provides:

"A bell of at least thirty pounds weight, or a whistle shall be placed on each locomotive engine, and shall be

rung or whistled at the distance of at least eighty rods from the place where the railroad shall cross any road or street, and be kept ringing or whistling until it shall have crossed such road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning or operating the railroad, and also be liable for all damages which shall be sustained by any person by reason of such neglect."

We construed that statute in the case of the *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb. 848, wherein we held that the statute "requiring that a bell shall be rung or a steam whistle sounded by locomotives at a distance of at least eighty rods from the place where a railroad shall cross any other road, etc., applies as well to roads in fact used by the public though not dedicated as public highways as to those so dedicated."

In that case as in this it was contended that the statute was limited in its application to a crossing over a public highway, and in answer to such contention, in the opinion by Judge Irvine, it is said:

"We do not think the statute should be given so narrow an application. Some courts have held that such a statute is in derogation of the common law, and therefore the subject of strict construction, but we think in most of the cases where such statutes have been confined in their application to public highways, the language of the statute was such as evidently to call for such restrictions. The object of the law was plainly to afford ample warning to persons near the railroad at points where they were probably about to cross as trains approached."

That case was decided before the day of automobiles and we see no reason now, when travel upon all highways and roads has increased many fold, owing to the extensive use of automobiles, to narrow and restrict the application of the statute.

There is no evidence showing that the road was a regularly laid out or dedicated public highway. The question is: Was it a road in fact used by the public? That the

road was traveled by only a limited number of persons is not important in determining the question involved. The important question is: Was it open to all who desired to use it? If so, it was a road in fact although it might accommodate only a limited portion of the public, or though it might accommodate some individuals more than others. 13 R. C. L. 16, sec. 4. While a public highway *prima facie* imports the way from one public place to another it may nevertheless be a *cul-de-sac*. *Warner v. Cavey*, 94 Neb. 778; 13 R. C. L. 14, sec. 2. The evidence shows that the crossing over the road was constructed in the same manner as other public crossings over country highways.

Applying the rule announced in *Chicago, B. & Q. R. Co. v. Metcalf, supra,* we hold that the evidence establishes that the road in question was a road in fact used by the public, although not laid out and dedicated to the public use, and that the place where the movement of the train started toward the crossing being eighty rods or less from the crossing, it was the duty of the defendant railroad company to ring the bell or blow the whistle continuously as it approached the crossing.

A finding that the statutory signal was not given as the train approached the crossing would warrant a finding that the failure to give said signal was the proximate cause of the collision and death of plaintiff's intestate.

In this connection counsel for appellants urge that the evidence shows that the bell was rung as required by the statute. Upon this question the evidence is conflicting and presented a question for the jury to determine. *Campbell v. Union P. R. Co.*, 100 Neb. 375.

There is also evidence that there was no conspicuous light on the end of the lead car that could be seen from the direction in which it was moving to warn persons of the approach of the train. Ordinarily it would be the duty of the railroad company, after dark, to have such a light so placed on the end of the lead car that it would warn persons of the approach of the train. See note, 15 A. L. R. 1527, 1528.

The questions whether, under the circumstances disclosed by the evidence, there should have been a light on the end of the lead car so that it could be seen from the direction in which the train was moving, and whether the lantern held by the brakeman at the place on the lead car shown by the evidence was a sufficient light for that purpose, were properly questions for the jury to determine, in determining whether defendants were guilty of actionable negligence in that regard.

We hold that on the questions of negligence and contributory negligence the facts in this case are such that different minds may reasonably draw different conclusions therefrom and were for the jury and not for the court to determine. *Hair v. Chicago, B. & Q. R. Co.*, 84 Neb. 398; *Lieb v. Omaha & C. B. Street R. Co.*, 119 Neb. 222; *Wortman v. Zimmerman*, 119 Neb. 682.

The appellants assign as error the giving of instruction No. 2 by the court, and the refusal to give instruction No. 4, requested by the defendants. One of the acts of negligence alleged was that there was no "person * * * on the crossing, to warn travelers upon said highway of the approach of said train to said crossing." By instruction No. 2 the court submitted that act of alleged negligence to the jury as one on which they might find a verdict against the defendants. On behalf of appellants it is contended there is no evidence that warranted the submission of that issue to the jury and that instruction No. 4, requested, withdrawing such issue should have been given.

We have no statute that requires the placing of a flagman or watchman at railroad crossings. The law seems to be well established that, in the absence of statutory regulation requiring it, the failure of a railroad company to have a flagman or watchman at a crossing will not warrant a jury in finding negligence on the part of the railroad company, unless there is evidence that such crossing is rendered more than ordinarily hazardous and dangerous by the conditions surrounding the same, and that the ordinary signals may be ineffective to warn travelers of the

approach of a train. *Grand Trunk R. Co. v. Ives,* 144 U. S. 408; *Glanville v. Chicago, R. I. & P. R. Co.,* 190 Ia. 174; *Hubbard v. Boston & A. R. Co.,* 162 Mass. 132; 52 C. J. 202; 22 R. C. L. 1008, sec. 238.

The defendant railroad company had no person at the crossing to warn travelers of the approaching train. There is nothing in the evidence to indicate that the crossing was more than ordinarily hazardous and dangerous, nor anything in the conditions surrounding the same that might render the giving of the ordinary signals ineffective to warn travelers of the approach of a train. The crossing was not much used by travelers, in fact it appears that the trainmen, in the years that they had been over the crossing at night, had never seen an automobile approaching the same until they saw decedent's car.

In the case of *Glanville v. Chicago, R. I. & P. R. Co., supra.,* in which one of the grounds of negligence was the failure of a railroad company to have a flagman or watchman at a crossing over a public highway, that court held, under a state of facts much stronger than are shown here, that the evidence was insufficient to carry that issue to the jury.

The evidence was insufficient to warrant the submission of that ground of negligence to the jury. It is manifest the submission of such issue to the jury was error prejudicial to the defendants, and calls for a reversal.

Error is assigned in the giving of instructions No. 1 and No. 2, in which the court, on its own motion, submitted to the jury the issues as to whether the train was moving at a high and dangerous rate of speed, and whether there was any one on the lead car. Both of those acts of negligence were withdrawn from the jury by instructions No. 4 and No. 5, given at the request of the defendants. While the instructions are conflicting, yet it does not seem probable that the jury were misled thereby to the prejudice of the defendants. While the practice is not to be commended of submitting an issue in one instruction and then withdrawing it in another, yet where we are satisfied that

the jury were not misled thereby, a reversal will not be predicated thereon. As this is not likely to occur on a retrial we give the question no further consideration.

On the petition of the defendant railroad company, this case was removed from the district court for Cass county to the district court of the United States for the District of Nebraska, Lincoln Division. The petition for removal alleged, as grounds therefor, diversity of citizenship, separable controversy, and the fraudulent joinder of the defendant railroad company with the defendant H. F. Kilmer. On a motion to remand evidence was taken, the motion sustained and the case remanded. The federal district court sustained the motion on the ground that there was a joint liability alleged, and that the joinder of the defendant Kilmer with the defendant railroad company was not fraudulent. It is contended that the federal court erred in remanding the case to the district court and that said court was without jurisdiction to hear and determine the case. Under the federal practice an order of a federal district court remanding a case removed thereto from the state courts is not subject to review either directly or indirectly, but is final and conclusive. *Pacific Live Stock Co. v. Lewis*, 241 U. S. 440; 23 R. C. L. 831, sec. 200. The rule is that, where a federal court has remanded to the state court a cause theretofore removed therefrom, no state court has power on appeal or otherwise to review such an order of the federal court. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463; 54 C. J. 375. "By an order of remand the state court is reinvested with jurisdiction and may rightfully proceed as though no removal had ever been attempted." 23 R. C. L. 832, sec. 201. The order of remand of the federal district court to the district court for Cass county is final and conclusive and is not subject to review by this court, and such order reinvested that court with jurisdiction and with the right to proceed as though no removal had ever been attempted.

For the error heretofore pointed out, the judgment is reversed and cause remanded for a new trial.

REVERSED.

IN RE ESTATE OF E. F. SKINNER.
EDGAR SKINNER, EXECUTOR, APPELLEE, V. BERTHA DEVALL ET AL., APPELLANTS.

FILED JANUARY 29, 1932. No. 27927.

1. **Wills**: CONSTRUCTION. When it becomes necessary to construe a will, the entire instrument will be considered, and if, from its language, the lawful intention of the testator can be ascertained, such decree will be entered as best gives effect to the intention therein expressed.
2. ———: ———: IRRECONCILABLE PROVISIONS. Where two provisions of a will are irreconcilable, the later will prevail over the earlier.

APPEAL from the district court for Washington county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Maher & Carrigan, for appellants.

O'Hanlon & O'Hanlon, contra.

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and RAPER AND RYAN, District Judges.

RYAN, District Judge.

On the 4th of October, 1927, E. F. Skinner, a resident of Washington county, Nebraska, executed his last will and testament. The provisions, so far as material to this case, are as follows:

"Second. I hereby give and bequeath unto my beloved daughter, Mrs. Bertha Devall, the sum of One Thousand Dollars ($1,000) to be paid to her within six months from the date of my death by my son, Edgar Skinner, and if not so paid the same shall bear interest at 4 per cent. from the date of my death.

"Third. I hereby give and bequeath unto my beloved daughter, Mrs. Ella Raver, the sum of One Thousand Dollars ($1,000) to be paid to her within six months from the date of my death by my son, Edgar Skinner, and if not so paid then the same shall bear 4 per cent. interest per annum from the date of my death.

"Fourth. In consideration of my beloved son, Edgar

Skinner, providing me with a good comfortable home the rest of my life together with the necessary food, clothing and care to sustain me in comfort and of his surrendering to me my note executed to his wife and also of his paying a note that I executed to the Plateau State Bank of Herman, Nebraska, I hereby give, devise and bequeath unto him my said son all the rest, residue and remainder of my estate, both real and personal wheresoever situated; but upon this further consideration that he pay to each of my said daughters named in the second and third paragraphs of this will the legacies therein set forth to each of them within six months from the date of my death and should he fail to do so then and in that event I do now provide that said legacies shall bear 4 per cent. interest from the date of my death, the said legacies shall be and remain a charge and lien against my real estate until fully paid. It is my intention that my said son shall keep my farm charged only with the payments of the above legacies.

"Fifth. I hereby nominate and appoint my beloved son, Edgar Skinner, executor of this my last will and testament without bond.

"In witness whereof, I have hereby declared the above to be my last will and testament this 4th day of October, 1927.

"E. F. Skinner."

Then follow the usual attestation clause and the signatures of two witnesses.

On September 27, 1929, E. F. Skinner died, and on November 2, 1929, Edgar Skinner, the executor named in the will, petitioned the county court of Washington county for the probate of the will, and on December 11, 1929, the will was duly admitted to probate and Edgar Skinner was appointed executor. He qualified and since that time has been acting as such executor. The usual statutory proceedings in probate followed, and on May 8, 1930, the executor filed his petition for final settlement, alleging, among other things, that he, as residuary legatee, had complied with all the specific conditions contained in the fourth

paragraph of said last will and testament. On May 16, 1930, Bertha Devall and Ella Raver, daughters of E. F. Skinner, deceased, filed objections and an answer to the petition for final settlement, and alleged that the devise in the fourth paragraph of the will failed because of noncompliance with the conditions therein, and asking that proof of heirship be taken and the property described in the fourth paragraph descend according to the intestate laws of the state of Nebraska. Hearing was had and a decree entered in favor of the devisee, Edgar Skinner. The appellants herein appealed from said order and decree to the district court for Washington county, Nebraska. Trial was had and on January 2, 1931, decree was entered, finding that the devisee, Edgar Skinner, had complied with all of the conditions in the fourth paragraph of said last will and testament, and that he was the absolute owner in fee simple, by reason of said devise, of all the property belonging to said estate. From these findings and decree the appellants bring the case to this court for review.

The appellee, Edgar Skinner, is the only son, and the appellants, Bertha Devall and Ella Raver, are the only daughters of the deceased. Appellee had lived at home with his parents until he was thirty-five years old before marrying. In 1913 he married and in 1929, when his father died, he was forty-nine years of age. The mother of the parties died in 1919. After appellee's marriage, his parents lived in one house on the farm and the appellee and his family lived in another on the farm until the death of the mother, when the father moved in with the appellee and his family and lived with them until his death. E. F. Skinner, the father, was past eighty-one years of age at the time of his death. He had purchased the land involved in this action about twenty-five years prior to his death. The appellee, Edgar Skinner, lived at home and after 1919 farmed this land. He paid all taxes, repairs, interest and other bills, but paid no other rent.

At the time the will was made, October 4, 1927, the deceased was indebted to Nettie E. Skinner, the wife of the appellee Edgar Skinner, for money borrowed, in a sum

not definitely disclosed by the evidence, which was evidenced by a note. The amount due on this note at the time of the death of E. F. Skinner appears to have been about $2,200. This is the note referred to in the fourth paragraph of the will. This note was surrendered by Nettie E. Skinner to the executor on December 12, 1929, about three months after the death of the testator. The entire estate of the deceased consisted of the eighty-two acres of land involved in this action and $3.65 in cash. The claims allowed against the estate, including the note to the Plateau State Bank and the expenses of administration, amounted to $852.25. This amount was paid by the executor, Edgar Skinner, as residuary legatee.

The deceased was indebted to the Plateau State Bank of Herman, Nebraska, on a note in the sum of $250, which is the other note referred to in the fourth paragraph of the will. The Plateau State Bank filed a claim for the amount of this note with the county judge of Washington county and it was allowed as a claim against the estate. It was paid by the executor out of his own personal funds on March 1, 1930.

The residuary legatee, Edgar Skinner, also tendered to Bertha Devall and Ella Raver the sum of $1,000 each, within six months from the date of the death of the testator, as provided in the second and third paragraphs of the will, but they refused to accept the same. He thereupon tendered the amount of these two legacies into court and the tender has been there continued.

It is contended by the appellants that the provisions of the fourth paragraph of the will are conditions precedent, and that, since compliance with these provisions was not made during the lifetime of the testator, the conditions were not complied with, and accordingly the devise in the fourth paragraph failed. The sole question necessary for the decision of this case is therefore whether or not the provisions of the fourth paragraph of the will are conditions precedent.

It is well settled that there are no set rules which always determine whether a devise be on a condition pre-

cedent. In different cases the same words have been interpreted differently. It is always a question of intention. The general rule is that, in interpreting or in construing a will, it is the duty of the court to ascertain, if possible, the testator's meaning and intention, and to give effect to it, unless it be prohibited by law. In determining the intention of the testator, the court must take into consideration all the facts and circumstances surrounding the testator at the time of the making of the will, as well as the provisions of the will itself. *Fisher v. Fisher*, 80 Neb. 145; *Gotchall v. Gotchall*, 98 Neb. 730; *In re Estate of Vandeveer*, 110 Neb. 651; *In re Estate of Smith*, 117 Neb. 776. Upon looking at the will, it will be seen that in the second and third paragraphs of the same the testator bequeathed legacies of $1,000 to each of his two daughters and in the fourth paragraph bequeathed the remainder of his estate to his son, Edgar Skinner, and made the legacies to the daughters a lien upon the real estate. He closed the paragraph with this statement: "It is my intention that my said son shall keep my farm charged only with the payments of the above legacies." Following the rule laid down by this court in *Martley v. Martley*, 77 Neb. 163, that the last provision in a will controls, where there are inconsistencies in the instrument, we think the language just quoted clearly indicates the intention of the testator and is controlling in this case.

Furthermore, the will made no provision for a forfeiture of the title, nor was a devise over made, in case of default on the part of the residuary devisee. We think it is clear that the testator did not intend the provisions set forth in the beginning of the fourth paragraph as conditions precedent, but merely stated the motives or reasons for the residuary devise.

We have carefully considered the evidence as to the care and support of the testator and find that the son substantially complied with the provisions of the will in that regard.

The decree of the district court is correct and is

AFFIRMED.

ALLEN DUDLEY & COMPANY V. FIRST NATIONAL BANK OF OMAHA: FIRST STATE BANK OF LARAMIE, APPELLANT: RALPH BROKAW ET AL., APPELLEES.

FILED JANUARY 29, 1932. No. 27931.

Banks and Banking: MISAPPLICATION OF DEPOSITS: RELIEF IN EQUITY. Where a bank has innocently taken drafts from a depositor who was not the true owner thereof, and applied the same upon a debt due it from such depositor, but has not changed its position in any way on account of the taking of such drafts, equity and good conscience require that the bank should account to the true owner for the proceeds of such drafts.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Finlayson, Burke & McKie, for appellant.

Kennedy, Holland & DeLacy and *McConnell & Pence, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and RAPER and RYAN, District Judges.

RYAN, District Judge.

This was an action instituted by Allen Dudley & Company, a live stock commission firm of Omaha, to enjoin the First National Bank of Omaha from paying to the appellant, First State Bank of Laramie, Wyoming, the proceeds of a draft made payable to the latter bank and collected from the plaintiff, Allen Dudley & Company, through the First National Bank of Omaha, upon the ground that others claim an interest in the proceeds of the draft. The appellant, appellees and others were made parties defendant. The appellees, Ralph Brokaw, Edith Brokaw and Rosenlieb & LeBeau, filed a petition of intervention, in which they claimed the proceeds of the draft in the amount of $1,970, as proceeds of cattle which they had sold to the defendant Dwight O. Herrick. The contest was solely between the interveners, who for convenience will be referred to as the appellees, and the appellant, First State

Bank of Laramie, Wyoming, as to who was entitled to the $1,970.

There is practically no dispute in the evidence as to the facts in the case, except as to the knowledge of the appellant's officers as to the source of the money in question. The appellant is a banking institution, organized and existing under the laws of the state of Wyoming, with its banking house at Laramie, Wyoming. The appellees in this case, Ralph Brokaw, Edith Brokaw and Rosenlieb & LeBeau, are ranchmen and cattle raisers, living approximately fifty miles northwest of Laramie, Wyoming. Dwight O. Herrick is, and was for many years prior to November 16, 1929, a cattle buyer and ranchman, living in Laramie, Wyoming, and the owner of a ranch upon which he ran cattle, located twenty-four miles west of Laramie, Wyoming, and it also appears quite clearly from the evidence that he was on November 16, 1929, and had been for some years insolvent.

The record discloses that the defendant, Dwight O. Herrick, had been indebted to the appellant in approximately the sum of $26,600 for several years, which indebtedness had been renewed from time to time and on which very little had been paid in the fourteen years it had been running. This indebtedness was evidenced by notes and a chattel mortgage on certain cattle belonging to Dwight O. Herrick.

It is further shown by the record that on or about the 18th day of November, 1929, Dwight O. Herrick had a balance in his checking account with appellant of approximately $2,779.56; that, on the 15th day of November, 1929, Herrick purchased some cattle from one Ole Ericksen, a resident of Albany county, Wyoming, and gave as a down payment therefor a check in the sum of $500. This check was presented to the appellant and paid on November 16, 1929. On this same day Herrick purchased some cattle from the appellees for the sum of $2,170.29, which sum was to be paid to the appellees at Rock River, Wyoming, upon delivery of the cattle. The cattle were delivered

with a bill of sale therefor, and Herrick delivered to Ralph Brokaw a check in the sum of $1,439.49, drawn upon the appellant bank, and gave Archie H. LeBeau for Rosenlieb & LeBeau a check in the sum of $730.80, in payment for the cattle purchased from them. This check was also drawn upon the appellant bank. This transaction took place about noon on November 16, 1929, at the town of Rock River, approximately forty miles north of Laramie. The appellant bank closed its place of business on Saturday, at the hour of 1 o'clock p. m., and said checks could not be presented for payment on that day.

The record further disclosed that all of the cattle purchased by Herrick were consigned to the plaintiff, Allen Dudley & Company, at South Omaha. After purchasing the cattle, Herrick returned to Laramie and drew two sight drafts upon the plaintiff, Allen Dudley & Company, which were made payable to the appellant bank, one for the sum of $9,347, which was drawn against the cattle purchased from Ole Ericksen, and the other in the sum of $1,970, which was drawn against the cattle purchased from the appellees. These drafts were mailed to the appellant bank, with instructions to deposit the same in his checking account.

The record goes on to show that on November 17, 1929, which was Sunday, Charles W. DeKay, cashier of the appellant bank, received the letter inclosing the drafts and took the same to the bank and mailed them to the appellant's correspondent, the First National Bank of Omaha, for collection.

The further facts are revealed that, on Monday, November 18, 1929, the appellant bank applied the balance in Herrick's account, including the credit given for the two drafts received by it on Sunday, totaling the sum of $14,096.56, upon the past due indebtedness of said Herrick, which amounted to $26,600. After this amount had been applied upon his indebtedness, there was nothing left in Herrick's account out of which any outstanding checks might be paid.

On Sunday, November 17, 1929, the appellees mailed the checks received by them from Herrick in payment for cattle to the First National Bank of Laramie, Wyoming, with which they did business, which, on the 18th of November, 1929, presented the checks to the appellant bank for payment and payment was refused. The First National Bank of Laramie notified the appellees to this effect, and on the following day, Tuesday, November 19, 1929, Ralph Brokaw and Archie H. LeBeau came to Laramie and the Brokaw check was again presented to the appellant bank for payment and payment was again refused.

Tuesday morning, November 19, 1929, the defendant Herrick went to the appellant bank and there talked with Charles W. DeKay, the cashier, concerning the drafts. At that time DeKay did not advise Herrick of the action taken the day before, in crediting his balance, together with the amount of these drafts, upon his indebtedness, but told him he had wired Omaha, inquiring about the payment of the drafts, and that the checks could not be paid until he was sure the drafts would be paid, and added: "We have all day in which to pay them." It appears that the defendant Herrick also wired the plaintiff commission firm regarding payment of the drafts.

There is also disclosed in the record that the appellees and the First National Bank of Laramie also wired the plaintiff concerning the sight drafts and instructed them to institute this suit to enjoin the First National Bank of Omaha from paying over the proceeds derived from the sale of the cattle to the appellant bank. Charles W. DeKay, cashier of the appellant bank, testifies that he did not know, at the time he received the two drafts, that they were drawn against cattle which had been purchased by Herrick from the appellees; that he did not know they were so drawn, at the time he applied the balance, including the credit given for these drafts, upon Mr. Herrick's indebtedness; that the first information he had in that regard was when the checks to Brokaw and LeBeau were presented for payment. The appellees, however, take the position

that the appellant bank knew the nature of Mr. Herrick's business, and that, if it did not know the real source of the drafts deposited on November 17, 1929, its knowledge of Mr. Herrick's business and his manner of doing business was such as to put the bank upon inquiry as to the nature of the transaction.

The defendant Dwight O. Herrick filed an answer, in which he admitted that the matters and things set forth in plaintiff's petition and the appellees' petition of intervention were true; that he gave the checks to the appellees, as claimed by them; and that said checks had not been paid; and that the money, which is the subject-matter of this suit, is the money received from the sale of the cattle belonging to the appellees and that they should recover the amount claimed in their petition. The answer of the appellant was a general denial.

Herrick was a witness for the appellees and testified in detail concerning the transaction with the appellees and his business dealings with the appellant bank, and claimed that he had an arrangement with the appellant that he would buy cattle and issue checks in payment for them, which checks were to be paid out of the proceeds of sight drafts which he would draw upon the plaintiff commission company and deposit with the appellant bank. The only officer of the bank who testified was the cashier, Charles W. DeKay. He denies any knowledge of any such agreement with Herrick, and also testifies that no one else had the authority to make such an agreement, regardless of the facts shown in the record. The record discloses a long course of dealings between Herrick and the appellant bank, which, if they do not substantiate Herrick's testimony as to the arrangement claimed by him, at least unquestionably show that such a procedure was followed, and that, during the months of September and October, 1929, Herrick made purchases of cattle totaling more than $25,000, drew sight drafts upon Allen Dudley & Company, and issued checks against the proceeds of these sight drafts, and that all of the checks were paid by the appellant bank.

Herrick further testifies that in 1928 he did business in exactly the same way, except that he shipped the cattle to a commission firm in Denver instead of to the plaintiff. In the light of this testimony, it cannot be said that the appellant bank did not have knowledge of Herrick's manner of doing business, and when the two sight drafts were received on Sunday, November 17, 1929, it knew or should have known that these sight drafts were drawn on Allen Dudley & Company against shipments of cattle which Herrick had made, and that Herrick had bought these cattle from various parties, as the record shows he had been in the habit of doing for a year or more, and that undoubtedly there were checks outstanding, representing the purchase price of these cattle, which were to be paid out of the proceeds of these drafts.

There is another circumstance that appears in the testimony of the witnesses that throws some light upon the action of the bank in crediting Herrick's account with the amount of these drafts and charging off the entire amount and crediting it upon his past due obligations. According to the testimony of Archie H. LeBeau, when he and Ralph Brokaw learned that the checks had been dishonored, they came to Laramie, and Brokaw got his check and went down to the appellant bank and again presented it for payment. Payment was again refused, and Mr. DeKay said: "He was sorry that there was no funds to take it up, but that he thought in the course of a few days Mr. Herrick's brother would come to his rescue and we would get our money through Mr. Herrick's brother; that Mr. Herrick's brother would come to D. O. Herrick's rescue with additional funds to cover up his indebtedness." Ralph Brokaw, in his testimony, quotes Mr. DeKay as follows: " 'I am very sorry for the embarrassing situation that has arisen over this deal.' He said, 'Had I known what it would cause I would not have done it.' He said, 'It was necessary to put Herrick in this embarrassing situation to force him to give the First State Bank more security upon an obligation that Mr. Herrick had with the First State

Bank.'" Charles W. DeKay in his testimony does not deny these statements, but merely states that he does not remember making them, and does say: "I says, I am in hopes if Herrick's brother comes out, and comes to his rescue, that this thing will be fixed up."

The trial court found that the appellees were entitled to the proceeds of the sale of the cattle shipped by Dwight O. Herrick to the plaintiff November 16, 1929; that the proceeds of the sale of said cattle amounted to the sum of $1,970, which the plaintiff paid to the Packers National Bank of Omaha, who, in turn, paid this amount to the First National Bank of Omaha for the appellant bank, and rendered judgment against the appellant, First State Bank of Laramie, Wyoming, in the sum of $1,970 and for costs.

The appellant claims to be a holder in due course of the draft made by Dwight O. Herrick to its order and drawn upon the plaintiff, Allen Dudley & Company, and that, when this draft was credited to the account of the defendant Dwight O. Herrick, it had the right to apply the balance in Herrick's account to his past due note in the bank.

It is conceded that a bank has a lien upon deposits and other property coming into its hands, to secure overdrafts and debts owing from the depositors. It is also clear that in the case of money neither a bank nor an individual should be required to accept it at the same risk and peril that they would other personal property, that money has no ear marks, and there is nothing about it that will give notice of the source from which it is derived. The proposition is also clear, and needs no citation of authority to sustain it, that where a bank, in the regular course of business, takes drafts or checks from one who is the apparent but not the true owner thereof, and, by reason of the apparent ownership of such drafts or checks, places itself in a position where it would be inequitable to require it to account to the true owner of the fund represented by such drafts or checks, the bank should not be held to account to the true owner of such fund. In the instant case, however, it is not contended by the appellant

that there was any change of position on account of the deposit of the drafts by Herrick. It advanced him no money or credit upon them. The First State Bank of Laramie was in exactly the same position after the deposit of such drafts as it was before. It did not change its position in any particular. Before the receipt of the drafts on November 17, 1929, Herrick owed the appellant bank approximately $26,600. He still owes that amount and obtained no credit by reason of the deposit of the drafts. His testimony shows that he deposited these drafts for the purpose of securing a credit with which to meet the checks he had issued in payment of the appellees' cattle. As was said by the court in *Shotwell v. Sioux Falls Savings Bank*, 34 S. Dak. 109: "We deny that there is any recognized principle of law, or even any reason founded upon that necessity which is said to know no law, that will sustain either the justice or necessity of holding that, when a fund, even though it consists of money, can be fully and clearly traced into the hands of one who has neither paid a valuable consideration therefor nor changed his relation to the person from whom the fund was received so as to give rise to any equitable defense against the claims of the true owner of such fund—when one man has money which in equity and good conscience belongs to another—such fund should not be recovered by the equitable owner thereof." The same principle was recognized in *Thex v. Shreve*, 38 Wyo. 285, in which it was held that the rule which gives a bank the right to set off the money or deposit to the credit of a depositor to the discharge of an indebtedness of the depositor to the bank was never intended to be extended to enable a bank to apply the funds which happened to be to the credit of an indebted depositor, and which in equity and good conscience belonged to another, to the discharge of such an indebtedness.

In principle this case is quite similar to *Cady v. South Omaha Nat. Bank*, 46 Neb. 756. In that case it was held that, where a commission merchant deposited in a bank money realized from the sale of live stock consigned to him

by a shipper and his account with the bank was overdrawn, regardless of the question of notice, the bank was accountable to the shipper, and that the bank could not apply the money deposited by the commission merchant to the satisfaction of such overdraft.

This is a case in which the cattle of the appellees were sold to Herrick for cash. Herrick executed and delivered to the appellees checks upon the appellant bank. The law is well settled that in such a case title did not pass, in the absence of payment of the checks. A check is not payment, but is only so when the cash is received upon it. *Lewis v. McMahon & Co.*, 307 Mo. 552; *Nelson v. Conroy Savings Bank*, 196 Ia. 391; *South San Francisco Packing & Provision Co. v. Jacobsen*, 183 Cal. 131; *Clark v. Hamilton Diamond Co.*, 209 Cal. 1. As was said in *First Nat. Bank of Byars v. Griffin & Griffin*, 31 Okla. 382: "Where goods are sold for cash and delivered, the vendor taking the vendee's check for the price, which on presentment within due time is dishonored, title to the goods does not pass, and the vendor may recover the value thereof from the vendee and from any party who has no greater equities."

The appellant bank cannot be permitted to recoup its losses of fourteen years ago at the expense of innocent parties. At the time the appellees learned that Herrick's checks would not be honored their cattle were gone. They had no remedy except to claim the proceeds of the sale. Unquestionably, as between these appellees and the appellant, the equities are all in favor of the appellees.

As we view the facts in this case and the law applicable to them, it is unnecessary to decide the other questions raised; however, if the question of notice were material, the evidence is ample to sustain a finding in favor of the appellees on that issue.

The decree and judgment of the district court was correct and is

AFFIRMED.

JULIED SITTLER, APPELLEE, V. AMELIA WITTSTRUCK, APPELLANT.

FILED FEBRUARY 5, 1932. No. 28158.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Frampton & Moseley, for appellant.

G. E. Hager and *Perry W. Morton, contra.*

Heard before ROSE, GOOD and EBERLY, JJ., and CARTER and CHASE, District Judges.

PER CURIAM.

From a decree of the district court, quieting in plaintiff title to a strip of land along the east end of the north half of the southwest quarter of section 6, township 8 north, range 6 west, in Lancaster county, Nebraska, and enjoining defendant from continuing to trespass thereon, defendant has appealed.

Plaintiff and defendant each asserted title to the tract in question and prayed to have his title quieted. Defendant was the record owner of the title; plaintiff claimed prescriptive title by adverse possession under claim of ownership for more than ten years.

Defendant complains because the trial court refused to grant her a jury trial. The action by plaintiff was essentially an action in equity and authorized by section 76-401, Comp. St. 1929. In *Eayrs v. Nason,* 54 Neb. 143, this court held that this section of the statute modified the old chancery rule, and that a party may maintain an action to quiet his title to real estate, whether he be in or out of possession, and whether his title be legal or equitable. Each party was seeking equitable relief; each was invoking the aid of a court of equity. The court very properly denied a trial by jury.

The principal question is whether the evidence is sufficient to sustain the judgment of the trial court. It is conceded that plaintiff is, and for many years has been,

the owner of the record title to the southeast quarter, and defendant the owner of the record title to the east half of the southwest quarter, of said section 6. For 40 years or more there has been a fence running north and south and slightly to the west of the boundary line between the two tracts of land. This fence at the north end was about 33 feet west of the true boundary, and the south end was approximately on the boundary line. By agreement between the respective owners, each was to and did keep in repair one-half of this fence; plaintiff the south and defendant the north half thereof. Recently, the defendant moved the north half of the fence from its former location to the true boundary line between the two tracts of land. Plaintiff, asserting that he is the owner of the land on the east side of the original location of the fence, brought this action.

It appears that for 40 years or more this fence has been maintained on its former location; that the plaintiff and his predecessors in title have cultivated and used the land as their own up to the fence line, and that during this time plaintiff and his predecessors have claimed title to the land, while defendant has cultivated and used the land on the west side thereof. Doubtless, by mistake, when the fence was built, instead of being on the true boundary line, it was set the distance west from the true boundary line, above indicated. The evidence discloses beyond dispute that plaintiff has had the open, notorious, continued, uninterrupted possession, use and occupancy, under claim of ownership, of all the land lying east of the fence, for more than ten years before defendant moved the fence.

It is a well-recognized principle of law that, where adjacent owners of land construct a fence as a boundary line between their respective tracts, and each uses and occupies the land to the fence, each claiming title to the land on his respective side of the fence for a period of more than ten years, each thereby acquires an absolute title, by adverse possession, to the land on his side of the fence, regardless of whether or not it was on the true boundary.

This principle is so well established that it requires no citation of authorities to sustain it.

The evidence not only justifies but requires the finding of the trial court that the strip of land in question, being 33 feet wide on the north end and 15½ feet wide on the south end, and being immediately west of the north half of the southeast quarter of said section, is vested in the plaintiff by adverse possession, and that defendant has been wrongfully trespassing thereon, and threatens to continue so to do. Plaintiff, having acquired title to this strip of land by adverse possession, became the true owner thereof, and title thereto was properly quieted in him. Defendant was properly and lawfully enjoined from further trespassing thereon.

The judgment of the trial court is right and is

AFFIRMED.

STATE, EX REL. PUBLIC SCHOOL DISTRICT NUMBER 6, CEDAR COUNTY, APPELLANT, V. CHARLES W. TAYLOR, APPELLEE.

FILED FEBRUARY 5, 1932. No. 27954.

Schools and School Districts: PUBLIC SCHOOL FUNDS: ALLOTMENT. The state superintendent of public instruction will not be required by mandamus to recognize a school district as a public school district entitled to share state educational trust funds created for secular public school purposes exclusively, if the only school in the district is sectarian, though organized, officered and certified as a public school district.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

John J. Ledwith and *P. F. O'Gara,* for appellant.

C. A. Sorensen, Attorney General, George W. Ayres and *Robert W. Devoe, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

ROSE, J.

This is an application for a peremptory writ of mandamus commanding the state superintendent of public instruction to recognize the school in School District Number 6, Cedar county, relator, as an accredited high school and as a public school entitled to share by apportionment moneys belonging to the Nebraska school funds.

Relator averred that it was regularly organized as a public school district many years ago and that it has ever since functioned as such; that it shared state public school funds until respondent interfered with its right thereto; that the superintendent of public instruction of Cedar county duly certified to respondent data showing that relator is entitled to its share of the state public school funds. The application alleges facts sufficient to entitle relator to the writ, if School District Number 6, Cedar county, is conducting a "common or public school," within the meaning of those words as used in the Constitution and statutes relating to schools and school funds.

Respondent admitted the organization of relator as a public school district, but resisted the application for mandamus on the ground that relator is not conducting therein a public or common school. In substance, respondent pleads in his answer that relator is conducting a religious, parochial and sectarian school to which state public or common school funds cannot legally be diverted or apportioned.

Evidence was adduced on both sides at considerable length. The district court found the issues in favor of respondent and denied a peremptory writ. Relator appealed.

Counsel for relator called attention to the facts that district number 6, Cedar county, is regularly organized as a public school district and that data entitling it to share state public school funds were certified by the county superintendent of public instruction of Cedar county to respondent. In this connection it was earnestly argued that the state superintendent of public instruction had under the law no alternative but to recognize relator as an ac-

credited public school district and to make for its benefit the necessary apportionment of public school funds. It was argued that any use of the school or school building for sectarian instruction or religious exercises inconsistent with a public school maintained at public expense should be prevented by public authority without destroying the school district or depriving the pupils therein of their constitutional right to a public school education.

The nature of the school and the character of the funds which a peremptory writ of mandamus would compel respondent to apportion to relator for school purposes are material inquiries. The high moral character, qualifications, courtesy, culture and refinement of the teachers were recognized by respondent and by the witnesses who testified in his behalf on those subjects. Moreover, the building in which the school is conducted is a commodious, subtantial stone and brick structure admirably adapted to school purposes.

The school building is situated in a rural community six or seven miles from the post office at Fordyce on a tract of approximately 13 acres of land belonging to St. Boniface Parish of the Roman Catholic Church. In front, across a highway, is a Catholic church. Not more than 150 feet away there is a parish house occupied by the parish priest who has the care of the three buildings of the group—all church property. There is no other building near. Cut in stone over the entrance to the school building, on top of which is a cross, is the name "St. Boniface School."

Relator, School District Number 6, Cedar county, does not own a schoolhouse but leases from St. Boniface parish three rooms in its school building, two on the first floor and one on the second, where pupils study, receive instruction and recite. Three teachers occupy living and sleeping rooms in the same building. In the basement there are a chapel and a kitchen. During the winter months the chapel is used for religious services conducted by the parish priest, where all pupils are permitted to attend. On

the altar in the chapel there are statues and other emblems of the Catholic religion. As a custom, during the greater part of the school year the priest of the parish says mass in the chapel at 8 o'clock in the morning. Before school opens for the day, pupils, while in the care of the school, march from schoolrooms to the chapel and there attend ritualistic services conducted according to Catholic faith and tenets. Beginning at 8:30 a. m. the parish priest devotes 15 minutes to religious instruction in the schoolrooms, the regular school work commencing at 8:45. The pupils have in their desks and study Catholic readers and the catechism used in Catholic parochial schools. Before and after recess they repeat little prayers.

At the request of the members of the school board of district number 6, Cedar county, the parish priest found for them three teachers who entered into a joint contract of employment for $120 a month for all. One of them received a monthly warrant for the services of the three. All are ordained nuns belonging to the Benedictine order of the Catholic sisterhood. In the schoolrooms and elsewhere they wear the garb of their sacred order, consisting of long black gown, white coif and white corona covered by a black veil. The garb includes the rosary also.

The school building and surroundings, the religious emblems, the sectarian textbooks and catechism, the prayers of the pupils, the garb and devotional attitude of the sisters and the instructions and services of the parish priest in the chapel and classrooms create an environment that reflects the spirit, example and belief of the Catholic religion in the school itself. Inculcation of that religion is part of the school work. Undisputed evidence in the record will admit of no other conclusion. Should respondent be coerced by mandamus into recognizing relator as a public or common school and consequently apportioning state public school funds to a school so conducted?

The Constitution enumerates "perpetual funds for common school purposes of which the annual interest or income only can be appropriated." These funds are trust

funds devoted exclusively to those purposes and cannot lawfully be diverted to other purposes. Const. art. VII, secs. 3-9. The Constitution declares:

"Such funds with the interest and income thereof, are hereby solemnly pledged to the purposes for which they are granted and set apart, and shall not be transferred to any other fund for other uses." Const. art. VII, sec. 9.

The Constitution further provides:

"No sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes." Const. art. VII, sec. 11.

"No preference shall be given by law to any religious society." Const. art. I, sec. 4.

The word "sectarian," as used in the Constitution, obviously applies to the Catholic church without any distinction between the original church and later denominations of the Christian religion, and is so used herein.

The effect of the writ demanded by relator as a matter of right would be to require the state superintendent of public instruction to apportion part of the interest and income from the state common school trust funds to a school in part sectarian—a school which is not a common or public school within the meaning of the Constitution. To recognize relator's school as a common or public school and to make the resulting apportionment sought by relator would amount to an illegal diversion of public trust funds from the purposes of the trust. To do so is not a duty enjoined by law upon respondent. The writ was properly denied.

AFFIRMED.

GRANVILLE WILLIAMS, APPELLEE, V. ADA NUTTER, APPELLANT.

FILED FEBRUARY 5, 1932. No. 27883.

Judgment: RES JUDICATA. A prior judgment on a different cause of action is, in a subsequent action, *res judicata* only as to such matters as were in issue in the former action.

APPEAL from the district court for Jefferson county: FREDERICK W. MESSMORE, JUDGE. *Affirmed.*

Perry, Van Pelt & Marti, for appellant.

John C. Hartigan, contra.

Heard before ROSE, GOOD, DAY and PAINE, JJ., and NISLEY, District Judge.

DAY, J.

The plaintiff brings this action to recover $1,500 which he claims one Nutter agreed to pay him if he would consent to the sale of certain Thomas county land which was owned by the plaintiff and upon which the defendant held a mortgage. The case was tried to a jury, which returned a verdict for $766, upon which a judgment was entered and from which the defendant appeals.

The amended petition alleges that the plaintiff was the owner of certain lands situated in Thomas county, Nebraska, and that the defendant held a mortgage upon this land upon which there was due approximately $4,500; that the plaintiff consented to permit defendant to sell or trade said land, with the understanding that the defendant was to pay plaintiff all the proceeds from the sale of the land over the amount of Nutter's lien; that the defendant entered into a contract to transfer the land to one Green, for which Nutter was to receive some land in Kansas; the plaintiff executed a deed to the land to Green, the defendant informing the plaintiff that the Kansas land was taken for a consideration of $6,000; that the defendant had agreed to pay plaintiff the difference, or $1,500. The defendant denied the allegations of the petition, and alleged that the cause of action as pleaded in the plaintiff's petition is *res judicata,* for that the issues have been determined in a case in the district court for Thomas county, Nebraska, wherein the plaintiff herein was a defendant and the defendant herein a plaintiff. He also alleged a written contract, which was denied by plaintiff.

The Thomas county case was a suit to rescind the trade

between Nutter and Green and to reinstate Nutter's mortgage upon the land in that county. Williams was made a party, but upon the final decree the court found that he had no interest in the land and he was dismissed from the action as having no interest therein. The only question in that case was whether Nutter had been defrauded by Green. The consideration upon which this action was based was the transferring of the legal title of land owned by Williams to Nutter, who held a mortgage upon it, in payment of the debt secured thereby. In conformity to this agreement Nutter released his mortgage and Williams, at Nutter's request, conveyed the land to Green. The causes of action are not identical, so that the former action, even if prosecuted to judgment between the parties, would not be *res judicata,* unless a right, question or fact in issue in the present action was put in issue and determined in the former action. A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a basis for a judgment between the same parties cannot be relitigated, even though the second suit is upon a different cause of action. *Chicago, B. & Q. R. Co. v. Cass County,* 72 Neb. 489; *Anderson v. Kreidler,* 56 Neb. 171. No reference is made in any of the pleadings or in the judgment to the transaction between Nutter and Williams, whereby the latter executed the deed to Green at the request of Nutter. The contract which is alleged as the basis of this action was not pleaded and was not an issue in that action. The judgment of the court in that action was that Williams had no interest in the litigation between Nutter and Green to rescind the exchange. When the second action is upon a different cause of action, a judgment in the prior action is *res judicata* only as to those matters in issue upon the determination of which that judgment was rendered. *Slater v. Skirving,* 51 Neb. 108; *Hamilton Nat. Bank v. American Loan & Trust Co.,* 66 Neb. 67, 82.

No right, question or fact to be determined in this case was adjudicated in the Thomas county case. Another test

applicable in this case is that Williams could not have appealed from the Thomas county case because the decision was in his favor. Can he be bound in this case adversely by a favorable judgment in that court? The answer is that the issues in this case were not in issue and determined in that case.

The other contention of the appellant is "that parol evidence is inadmissible to vary or contradict the terms of a written instrument." As an abstract rule of law this contention is correct, but there was a dispute as to whether there was a written contract. The alleged contract was questioned and denied by the plaintiff. The question as to what the contract was between the parties was submitted to the jury under proper instructions. Among other things, the jury were instructed that parol evidence cannot contradict a written agreement, but may explain that which is ambiguous. Before the rule could be applied, it was necessary to decide whether there was a written contract. This issue of fact was resolved by the jury in favor of the plaintiff.

We have examined the entire record and find no prejudicial error. The judgment of the district court is

AFFIRMED.

ALVA R. ROBINSON ET AL., APPELLANTS, V. JOHN T. BRESSLER ET AL., APPELLEES.

FILED FEBRUARY 5, 1932. NOS. 27855, 27856.

1. **Vendor and Purchaser: "MARKETABLE TITLE."** A marketable title is a title free from reasonable doubt both as to matters of law and fact—a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and ready to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept.
2. ———: ———: EVIDENCE: OPINION OF ATTORNEY. The good faith opinion of counsel of experience and good standing, in reference to a title which he has examined, is a material fact to be considered by the court in determining the marketability of the title.

3. ———: ———: RESCISSION. The defects in the title considered in the opinion are sufficient to render the title in controversy unmarketable and, under the circumstances of the case, to justify the defendants in refusing to accept it, and the court in awarding a rescission of the contract of purchase.
4. ———: RESCISSION: LIEN FOR PURCHASE PRICE. Upon award of rescission, the purchaser may be entitled to a lien upon the property for the amount of purchase price theretofore paid.
5. ———: ———: ACCOUNTING. Upon a review of the accounting as made in the trial court, *held,* that the same should be modified, and the sum recoverable by defendants, as and for return of the purchase price, reduced to the sum of $75,000, with interest from the date of the decree.

APPEAL from the district court for Dixon county: MARK J. RYAN, JUDGE. *Affirmed as modified.*

Kingsbury & Kingsbury and *Nesbitt, Goodwin & Nesbitt,* for appellants.

C. H. Hendrickson, J. J. McCarthy and *E. J. McCarthy, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and BLACKLEDGE, District Judge.

BLACKLEDGE, District Judge.

On July 21, 1919, the plaintiffs as vendors made a contract for the sale of 635 acres of land situated in Dixon county, Nebraska, with A. R. Davis as purchaser. The sale price was $160,000, and $20,000 was paid at the execution of the contract. The contract provided that the vendors should convey and assure to the party of the second part in fee simple, clear of all incumbrances, by good and sufficient warranty deed and abstract of title showing of record good and perfect title to the land. The contract was to be performed March 10, 1920.

Although the contract was made in the name of A. R. Davis as purchaser, it appears that others were jointly interested with him in the purchase and it was so understood between all of the persons who claimed an interest in the purchase. There is no dispute that the vendors recognized defendant John T. Bressler as being one of the purchasers

and he principally transacted the business on behalf of the purchasers. Whether the other persons were or were not interested to the extent claimed by defendants at the trial does not seem to have any material bearing in the determination of the case. The trial court found that it was understood and agreed by all the parties that those interested as purchasers were A. R. Davis, John T. Bressler, William E. Von Seggern and John T. Bressler, Jr., each having a one-fourth interest.

At the time for performance of the contract, it developed that the purchasers had arranged a resale of one quarter section of the land, the northwest quarter of section 20, township 28, range 14, to one Thomas Erwin at the price of $50,000, and that the vendors were not then able to give good title to any of the land. Thereupon it was arranged that the purchasers should complete their sale of the one quarter section to Erwin, who would accept a conveyance made directly from the plaintiffs and a bond in the nature of an indemnity procured by John T. Bressler, indemnifying Erwin against any defects or imperfections in the title; that the purchasers should make additional payments on the purchase price, go into possession of the premises, and that the vendors should proceed to correct and perfect the title.

At this time the purchasers did make to the vendors two additional payments of $50,000 each upon the purchase price. The conveyance was made to Erwin and he settled with his vendor Bressler by paying half of his purchase price and executing for the remaining $25,000 a mortgage maturing March 1, 1940, at 5 per cent. interest, and thereupon entered into full possession and control of the land. As to this part of the land the trial court found that the defendants sold the same to Erwin receiving therefor the sum of $50,000, and that by agreement of all the parties a deed was executed by plaintiffs for this land directly to Erwin, and as that is a separate and completed transaction and apparently beneficial and agreeable to all parties concerned, that part of the contract is allowed to stand and

is not affected by the decree, except that the defendants were required to account, in the accounting made by the court, for the full amount of the purchase price.

There was an abstract of title made and certified as of date January 28, 1920. It seems to have been taken and understood then by all of the parties, as was the fact, that the abstract did not show good title of record in the vendors. There were certain defects apparent which all recognized must be corrected, although it does not appear that at that time there had been any real examination of the title or opinion by a title examiner.

The title record showed a warranty deed covering the south half of section 17 by Amanda G. Lee and husband to O. E. Clark, duly executed and acknowledged in June 1881, and recorded July 2, 1881. It also showed that the patent covering the whole section of land, that is, the north half of section 20, and the south half of section 17, was issued to Elijah N. Robinson and recorded January 24, 1919, although dated October 10, 1870. It was also a fact that in the meantime Elijah N. Robinson, patentee, had died in January, 1909, a resident of the state of West Virginia, his will dated in 1903 had been probated in that state in February, 1909, but no probate proceedings had ever been had in this state as affecting these lands. The vendors were claiming title and assuming to convey the same as heirs and devisees of said Elijah N. Robinson. It further appeared that John T. Robinson, son of Elijah N. Robinson and one of the devisees in his will, died in September, 1909, intestate, a resident of the state of Indiana, and leaving surviving him a widow and two daughters, and that no proceedings for the probate of the estate of said John T. Robinson in this state as affecting said land had been had.

There were other matters connected with the title which were more or less discussed between the parties, but the principal things concerned these two estates and the Amanda G. Lee deed to O. E. Clark and, later on, the matter of inheritance taxes as against the two estates.

While these conditions existed and after the time stipulated in the contract for its performance, the vendors did proceed in April, 1920, to institute proceedings in the county court of Dixon county for the probate of the foreign will of Elijah N. Robinson, which proceedings resulted in a decree of that court on May 3, 1920, admitting the instrument to probate in that court, and ordering that regular administration be dispensed with and that the real estate described in the petition filed herein "be and the same hereby is assigned in accordance with the terms and conditions of the last will and testament of the said E. N. Robinson, deceased." At about the same time the vendors also instituted in the county court of Dixon county proceedings for the determination of heirship in the matter of the estate of John T. Robinson, deceased, which proceedings resulted in a decree of that court May 10, 1920, adjudging that Ida B. Robinson, his widow, and May R. Cross and Clio Bond, as children, were the sole and only heirs at law of John T. Robinson, deceased, and as such were owners of an undivided interest in the Dixon county land. In the meantime, in August, 1919, and in April, 1920, respectively, the widow, Ida B. Robinson, and Clio Bond, with her husband, had executed deeds conveying this land or their interest in it to the plaintiffs; and it appears from the testimony, although not in the abstract, that there was a contract between these vendors and the remaining heir, May R. Cross, as to which a controversy arose between the parties and litigation was had in the courts of West Virginia, which finally terminated in the vendors procuring a deed from May R. Cross and her husband executed and filed of record in January, 1922.

It should also be stated that at the time of the arrangement between the parties when performance of the contract was due, the defendant John T. Bressler, although not having title to the property in question, the deed for all of which except the Erwin tract being held in the possession of the First National Bank of Wayne, Nebraska, executed a mortgage to the plaintiffs for $25,000, upon the

southeast quarter of section 17 and, a year later, paid the interest and $5,000 of the principal sum represented by such mortgage. The mortgage debt was made in five different notes of equal amount maturing annually, the first in 1921.

Mr. C. F. Barnes, husband of a daughter of Elijah N. Robinson, was principal spokesman and correspondent on behalf of plaintiffs and John T. Bressler on the part of defendants. The plaintiffs did nothing further in the way of perfecting their title, but urged the payment of the balance due of the purchase price, which was now represented by the mortgage just referred to and a balance of $15,000, on the original contract. The defendants made some other payments of interest, but occasionally insisted that they could not handle the land because the title was defective and they were not able to pay because of the deflation in land market and values. Plaintiffs insisting upon further payments the defendants, on or about April, 1923, submitted the abstract for examination and opinion as to title to Fred S. Berry, an attorney at Wayne, Nebraska. Mr. Berry gave his written opinion as to the title under date of April 13, 1923, and it was soon thereafter transmitted to Mr. Barnes as representing the plaintiffs. Nothing further was done, however, by plaintiffs in correction of the title. They insisted that it had already been made good. The defendants made no further payments on account of the purchase price. Negotiations, however, in a sort of a desultory way continued between the parties until the fall of 1926, during which time defendant Bressler made one or two offers to take the property subject to the claimed defects of title except inheritance taxes, upon the making of a specified discount from the balance of the purchase price, but nothing was accomplished and in July, 1929, the plaintiffs filed a petition in the district court for Dixon county for the purpose of foreclosing said mortgage of $25,000, and the following November filed their petition in said court for the purpose of foreclosing the contract of sale and purchase and recovery of the bal-

ance due thereon. These are the two suits that are now here for determination.

The defendants set up in each suit the contract of purchase and proceedings had under it, the defects of title as they claim them to be, and claimed a rescission of the contract and cancelation of the mortgage. They further allege that the plaintiffs were nonresidents of the state of Nebraska and own no property therein except that involved in this controversy, and ask that they be allowed a lien upon the property for a return of the purchase price theretofore paid which should be decreed to them, and offer to restore possession to the plaintiffs.

The trial court consolidated the two actions, heard them together and determined them in one decree. Also during the pendency of the proceedings, A. R. Davis having previously died, his executrix and heirs were made parties defendant and Von Seggern and Bressler, Jr., appeared and answered, so that all of the parties were before the court.

Some objection was raised by plaintiffs to the matter of consolidation of the cases and the appearance therein of the other defendants as parties in interest under the contract of purchase, but as these were matters within the discretion of the trial court, which discretion we cannot see has in any wise been abused, and there is nothing to show that the plaintiffs were prejudiced thereby, we do not think they merit further attention.

The trial court found generally for defendants and that the equities were with them, and that plaintiffs had not acted with such diligence, fairness and regard of the rights of others as is generally required by courts of equity, did not perform their contract, and that defendants were entitled to a rescission thereof. The court further found as is hereinbefore stated as to the separability of that part of the contract and transaction which had led to the conveyance to Thomas Erwin, and that the plaintiffs did not have a marketable title to the land and induced the defendants to make the payments and execute the mortgage involved herein upon the understanding that the plaintiffs

would diligently proceed to perfect their title; that defendants have been in possession of the real estate under that condition and have collected the rents and profits therefrom. The court then proceeds to make an accounting of the amounts paid by defendants on account of the purchase price and of the amounts involved in the Erwin transaction and amount unpaid of the purchase price and of rents and profits received by the defendants and finds that there is a balance due of $117,199, which should be returned to the defendants, the contract and mortgage canceled, and making said balance a lien upon the land, except the Erwin quarter, in favor of the defendants. The court also made suitable provisions for the distribution of the proceeds as between the parties defendant and in reference to settlements with tenants in possession concerning certain improvements on the property, and generally a quite comprehensive decree for the disposition of all interests and distribution thereof.

The plaintiffs make some further objection to the decree in that it provided that the amount adjudged to be returned on account of the purchase price was made a lien upon the property. As a basis for this it appears that the plaintiffs were nonresidents of this state and had no other property within the state. Under the circumstances of the case, we hold that in case of rescission such a provision in the decree is entirely proper. 27 R. C. L. 627, sec. 383; *Elterman v. Hyman*, 192 N. Y. 113, 127 Am. St. Rep. 862; *Everett v. Mansfield*, 148 Fed. 374, 8 Am. & Eng. Ann. Cas. 956.

The real question upon which the case turns is the sufficiency of plaintiffs' title; and the questions remaining in plaintiffs' showing in that regard are as to the effect, if any, that should be given to the deed by Amanda G. Lee to O. E. Clark, the insufficiency, if any, in the matter of the probate proceedings concerning the estate of Elijah N. Robinson, and the matter of the inheritance taxes.

Of course, there are other features discussed in the briefs, and in connection with the title, none of which per-

haps in themselves would be sufficient justification for refusal of the title, but which in the aggregate should go into the scale in determining the question of plaintiffs' diligence, fairness and regard for the rights of others to entitle them to the relief asked, which in this case would approximate specific performance of the contract, and should be adjudged on that basis.

As illustrative of the preceeding statement, long after these cases had been commenced, and on the eve of trial, the plaintiffs did undertake some further compliance with defendants' objections to title by procuring and recording in the county records an affidavit of Alva R. Robinson covering certain historical features of the proceedings, but the particular part, if any, thereof being the statement which undertakes to show the death of the wife of Elijah N. Robinson. Also the affidavit of Alice B. Barnes which discusses the relationship of the parties and makes an identification as to names. Also another affidavit of Alva R. Robinson which undertakes to show possession on the part of himself and his coplaintiffs and of Elijah N. Robinson their ancestor and that neither Amanda G. Lee nor O. E. Clark had or claimed possession of the premises. There is also attached to the abstract, but not shown as one of the entries thereon nor shown to have been filed or recorded, a certificate of Abe Montgomery, clerk of the county court of Brooke county, West Virginia, purporting to delineate the proceedings had in that court and the regularity thereof in the matter of the estate of Elijah N. Robinson. The plaintiffs urge that they should have the benefit of these things upon the doctrine that they were apparent before the trial and decree and that it is sufficient if they tender a good title at any time up to the time of trial, relying upon the authority of the case of *Seaver v. Hall,* 50 Neb. 878. There doubtless are circumstances, as there were in the case of *Seaver v. Hall, supra,* where it is equitable to allow a vendor the benefit of such showing; but the plaintiffs have insisted at least since 1926, and did insist as late as the filing of their reply in these cases,

that the title they had tendered was good and sufficient. They further urged at the trial that the defendants had no right of rescission because of having entered into possession of the land and had waived the same thereby as well as by execution of the mortgage which is involved in this suit.

All these matters were for the equitable consideration of the court along with other features in the case.

Upon the part of the defendants it was contended in reference to the proceedings for the probate of the will of Elijah N. Robinson, and an inspection of the record shows the contention well founded, that the proceedings did not, either such as were had in the state of West Virginia or those in this state, show, nor did either court determine, any question as to the wife or widow of Elijah N. Robinson, deceased, or whether she survived him. The record of the West Virginia court shows that certain persons who are named as parties in interest appeared and subjected themselves to the jurisdiction of the court, but it makes no attempt to determine whether those were all the parties interested and makes no mention or determination as to any surviving widow. In the probate proceedings in Nebraska upon the foreign will, there is an allegation in the petition that he left no widow surviving; but the court makes no finding in that regard, and its decree is that the real estate is assigned according to the terms and provisions of the will, which will upon its face gives to the widow an interest in the premises.

Another question raised is as to the deed by Amanda G. Lee. It is contended by the plaintiffs that this deed is simply a stray, or the deed of an interloper, not otherwise connected with the chain of title, and that therefore it amounts to nothing and should be given no consideration. This proposition should be considered as it existed in reference to this particular title. There are instances, of course, where, there being a chain of title, some stray deed which appears on record and having no connection with the title is deserving of but little consideration; but

at the time of this purchase, the contract for which was made in July, 1919, this deed was the only instrument which had been on record purporting to affect the title, except the patent. The patent itself had been recorded less than six months before this contract of purchase was entered into. The patentee had been dead for ten years when it was recorded and it had not been recorded during his lifetime although dated in 1870. The deed by Amanda G. Lee to O. E. Clark was regularly executed, acknowledged and entitled to be recorded, and stood for nearly 40 years as the only muniment of title appearing on the records for that tract of land which covered half the acreage involved in the contract of purchase. In this situation and with the plaintiffs residing in a distant state and claiming, not by any conveyance, but under the law of wills, and with nothing on record in their behalf until after this contract was by its terms to be performed, it is not unreasonable that the purchaser should require some special assurance in reference to his title.

There are cases which hold that the deed of a stranger does not constitute a cloud upon the title. This matter of cloud on title has been before the courts so much and in so many different ways that it has become a term with which to conjure. Largely because courts of equity had so circumscribed its meaning and application, this state and many states have enacted laws for the quieting of titles which cover instances where the instrument would not be recognized under the earlier equity practice as a cloud upon the title.

Because of the general adoption of registration laws, whereby the records became so universally and entirely relied upon to show the character of the title, and the undeniable fact that often instruments of record not recognizable as clouds under the existing equity practice did nevertheless actually adversely affect the title and impair its value, severe criticism of the earlier doctrine was offered by an eminent authority in this language:

"While this doctrine may be settled by the weight of

authority, I must express the opinion that it often operates to produce a denial of justice. It leads to the strange scene, almost daily in the courts, of defendants urging that the instruments under which they claim are void, and therefore that they ought to be permitted to stand unmolested, and of judges deciding that the court cannot interfere, because the deed or other instrument is void, while from a business point of view every intelligent person knows that the instrument is a serious injury to the plaintiff's title, greatly depreciating its market value, and the judge himself who repeats the rule would neither buy the property while thus affected nor loan a dollar upon its security. This doctrine is, in truth, based upon mere verbal logic, rather than upon considerations of justice and expediency." 4 Pomeroy, Equity Jurisprudence (4th ed.) sec. 1399.

It has followed that legislative enactments have broadened the powers and duties of the courts in reference to such matters, and the courts themselves have come to a fuller recognition of the requirements of modern business pertaining to record titles. *Holland v. Challen,* 110 U. S. 15; *McGuinness v. Hargiss,* 56 Wash. 162; *Kinsman v. Spokane,* 20 Wash. 118, 72 Am. St. Rep. 24; *Broderick v. Cary,* 98 Wis. 419; *Palmer v. Yorks,* 77 Minn. 20; *Moores v. Clackamas County,* 40 Or. 536.

By statutory provision (Comp. St. 1929, sec. 76-215) the deed under consideration was entitled to be recorded, and it, or the record thereof, was receivable in evidence without further proof, and it is declared (Comp. St. 1929, sec. 76-237) that no conveyance of lands is void for the reason that at the time of its execution such lands are in the possession of another claiming adversely.

The attorney who examined the title was also a witness in the case. He is and has been for years a member of the bar of this state, recognized both locally and generally throughout the state as a lawyer of experience and of high standing, integrity and ability. We do not mean to hold that the opinion of counsel is controlling in a case of this

kind for the purpose of determining whether the title is good or bad, but we recognize that it is the usual practice for persons dealing in property of this nature to apply to attorneys having some knowledge and experience in that line and to rely upon the advice given them. The court should and does consider the good faith opinion of counsel as a material fact in such matters. Such opinion that a title is unmarketable may or may not in itself be sufficient to create a doubt which would justify a refusal to accept the title. The importance and value of an opinion in a particular case must depend upon the counsel and the circumstances under which he is acting. *Howe v. Coates,* 97 Minn. 385, 114 Am. St. Rep. 723; *Cummings v. Dolan,* 52 Wash. 496, 132 Am. St. Rep. 986, and note 1043; *Walker v. Gillman,* 127 Mich. 269.

A marketable title means a title free from reasonable doubt both as to matters of law and fact—a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and ready to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept. *Todd v. Union Dime Savings Institution,* 128 N. Y. 636; *Howe v. Coates,* 97 Minn. 385, 114 Am. St. Rep. 723.

There is also for consideration the matter of the inheritance tax which might perhaps have been compensated for or obviated by an abatement from the purchase price, and yet there is no reason why the purchaser should be put to the necessity of himself having a determination made by the proper tribunal to find and assess the proper amount of inheritance tax. As to the matter of the estate of Elijah N. Robinson, it appears that during the course of the trial of this case one of the abstracts was removed from among the exhibits and an entry made thereon showing the payment in November, 1921, of an inheritance tax in the matter of that estate; but there is no showing anywhere in reference to an inheritance tax in the estate of John T. Robinson, deceased. We cannot say that the conclusion of the counsel in this case was wrong.

We hold that the claimed defects in the title asserted by the defendants and hereinbefore discussed are sufficient to render the title unmarketable, and that they, remaining uncorrected for several years and until after the commencement of these suits to enforce completion of the purchase, warranted the refusal by the defendants and the allowance by the court of the rescission of the contract.

There remains for further consideration the matter of the accounting by the court and the provisions resting thereon. This we have carefully considered, and while the theory upon which the court made the accounting is recognized and is applicable in some cases, yet the practical working out of it in this case does not seem to do justice between the parties. The court took for computation the various payments that had been made on the purchase and computed interest thereon at 7 per cent. per annum up until the time of trial, charging the plaintiffs with the total amount. It then determined from the evidence the amount of rents and profits received by the defendants during the same period, computing interest in the same way thereon, and upon the $50,000 realized from the Erwin sale, and charged the defendants with that amount, striking a balance therefrom the result of which is $117,-199, for which decree was entered. When it is considered that the parties themselves had by their contract fixed the value of the property at $160,000, and that the Erwin quarter had been eliminated by the acts of both parties, it does not seem right that the plaintiffs should by any computation become chargeable for so much of an excess in favor of the defendants who during the time retained possession and received the rents and profits from the whole property. The parties were upon an equal basis as far as dealing with the property was concerned, and while they did not proceed with such diligence as to entitle them to the full measure of relief that the law sometimes provides, it does not seem that the defendants should be allowed to receive the whole use of the property, plus a considerable amount for the use of the purchase price. The

aggregate amount of interest included in such accounting and charged against plaintiffs is something in excess of $95,000, and the aggregate amount of interest included in the accounting and charged against the defendants is something in excess of $41,000. We think that the accounting may be made upon a much simpler basis and more nearly approximating justice. There appears to be no occasion for the computation of interest at all up to the time of trial. By their voluntary acts the defendants had possession of the property and plaintiffs had possession of $125,000 of the purchase price which had been paid to them. Plaintiffs are not entitled to have interest upon the unpaid balance of the contract price because they had not perfected their title and tendered it so as to entitle them to recover the balance of the purchase price; but, as against the use of the property by the defendants, the plaintiffs are justly entitled to the use of so much of the money as had been paid to them. Both were also entitled to the permanent elimination of the $50,000 on account of the Erwin land. This would leave, not making any allowance to Bressler on account of the $2,000 commission, a balance of $75,000, to the return of which defendants are equitably entitled, and which they should receive with interest thereon from the date of the decree of the trial court as and for a return of the purchase price.

The judgment and decree of the trial court will therefore be and hereby is modified in this particular by reducing the amount of $117,199, therein provided to the sum of $75,000, and eliminating the accounting as made in said decree, but otherwise approving and affirming the decree of the trial court in all its provisions.

AFFIRMED AS MODIFIED.

CHRIS J. KIENKE, APPELLANT, V. WILLIAM N. HUDSON ET AL., APPELLEES.

FILED FEBRUARY 5, 1932. No. 27743.

1. **Statutory Provision.** "Every director of a commercial state bank, other than cooperative banks, having a capital of $50,000

or less, must be the owner of at least 4 per cent. of its capital stock in his own name and right. Comp. St. 1929, sec. 8-121," *Kienke v. Kirsch*, 121 Neb. 688.

2. **Banks and Banking**: OWNERSHIP OF STOCK: ESTOPPEL. "One who knowingly permits a certificate for shares of the capital stock of a commercial bank to stand in his name, for the fraudulent purpose of making it appear that he is thereby qualified, under the law, to become a director of such bank, and by virtue of such apparent ownership does become and act as such director, in violation of law, will not be heard to say that he was not the owner of said shares of stock in his own right, during the period he so served as such director." *Kienke v. Kirsch*, 121 Neb. 688.

APPEAL from the district court for Keya Paha county: ROBERT R. DICKSON, JUDGE. *Reversed.*

J. J. Harrington and *Ross Amspoker*, for appellant.

Sterling F. Mutz, contra.

Heard before ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ., and HORTH, District Judge.

HORTH, District Judge.

This is a companion case of *Kienke v. Kirsch*, 121 Neb. 688. It involves similar controlling facts and is determined by the opinion in the foregoing case, and for the reasons therein stated the judgment is reversed and the cause is remanded for further proceedings.

REVERSED.

HORACE CARY ET AL., APPELLANTS, V. A. H. REITER ET AL., APPELLEES.

FILED FEBRUARY 5, 1932. No. 27890.

1. **Appeal**: CONFLICT OF EVIDENCE. While, under the statute, this court is required to try an action in equity *de novo*, yet, when the evidence on material issues so conflicts that it cannot be reconciled, it will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
2. *Held*, that the evidence in this case justifies the findings of the trial court.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

George A. Munro, for appellants.

Nye & Nye, contra.

Heard before ROSE, GOOD and DAY, JJ., and MESSMORE and NISLEY, District Judges.

MESSMORE, District Judge.

This is an action in the nature of a creditors' bill brought by appellants, who were plaintiffs below, to set aside certain conveyances executed by appellee herein, A. H. Reiter, to appellees Ida E. Reiter, Sophie Legband and Herman G. Reiter.

Appellants' petition alleges that they are trustees for the depositors and unsecured creditors of the former American State Bank of Kearney, appellant A. C. Wittera also being trustee for the depositors' committee for said bank; that on the 13th day of September, 1930, a judgment was rendered in the district court for Buffalo county in favor of appellants and against appellee A. H. Reiter in the sum of $3,771 and costs; that an execution had been issued on said judgment and returned by the sheriff of said county wholly unsatisfied.

Appellants further allege that appellee A. H. Reiter conveyed certain real property and chattels to Ida E. Reiter, Sophie Legband and Herman G. Reiter with intent to hinder, delay and defraud appellants; that there were pretended but no actual considerations for said conveyances; that appellees Ida E. Reiter, Sophie Legband and Herman G. Reiter knew of the indebtedness of appellee A. H. Reiter to appellants; that said conveyances were made March 4, 1930, March 6, 1930, and March 15, 1930, while the action of appellants against appellee A. H. Reiter was pending in said district court and prior to the entry of judgment therein, and that appellants obtained a judgment against appellee A. H. Reiter in said action.

Appellee Ida E. Reiter in her separate answer specifically

alleges that the northwest quarter of section 8, township 10 north, range 18 west, in Buffalo county, was occupied by herself and husband, A. H. Reiter, as their home where they had resided for several years, and she claimed a homestead exemption therein of $2,000 over and above a prior mortgage lien of $4,000 thereon.

Appellee Herman G. Reiter specifically alleges in his separate answer that appellee A. H. Reiter was indebted to him for a loan of money in the sum of $1,000 and that the same was past due and unpaid.

Appellee Sophie Legband specifically alleges in her separate answer that appellees A. H. Reiter and Ida E. Reiter were indebted to her for loans made to them and that the same were past due and unpaid.

All appellees in their separate answers specifically deny any intent to hinder and delay appellants, or any creditor, and allege that said conveyances were made in good faith and for the purpose of securing past-due indebtedness owing the respective parties by the said A. H. Reiter.

Appellants by way of a reply filed general denials to all answers.

By stipulation of the parties on the evidence it was agreed that appellants obtained a judgment against A. H. Reiter on September 30, 1930, for $3,771 and costs; that execution was issued on said judgment and returned wholly unsatisfied for want of property on which to levy.

It was further stipulated that on March 4, 1930, A. H. Reiter had title to the east half of section 14, township 9 north, range 18 west of the sixth P. M., in Buffalo county, and had had title to the southeast quarter of said land since 1915 and title to the northeast quarter thereof since 1919; that on March 4, 1930, said land was incumbered with a mortgage of $6,000 in favor of the Union Central Life Insurance Company, said mortgage covering the whole half section; that on said date A. H. Reiter and Ida E. Reiter, his wife, executed a mortgage on said land to Sophie Legband, the consideration named therein being $1,150, and being made subject to the prior mortgage of $6,000;

that on March 6, 1930, A. H. Reiter conveyed by warranty deed said land to his wife, Ida E. Reiter, which deed was recorded in the office of the register of deeds of said county, the consideration named in said deed being $3,000; that on the 15th day of March, 1930, A. H. Reiter held title to the northeast quarter of section 8, township 10 north, range 18 west of the sixth P. M., in said county, on which there was a mortgage of $4,000; that the said A. H. Reiter had held title to said land since June, 1919; that on March 15, 1930, the said A. H. Reiter conveyed said land by warranty deed to the said Ida E. Reiter, the consideration named therein being $1,000; that on March 4, 1930, appellees A. H. Reiter and Ida E. Reiter executed a bill of sale for certain chattel property to Herman G. Reiter, the consideration named therefor being $1,000; that said bill of sale was filed and recorded in the office of the county clerk of said county on March 5, 1930; that the said Herman G. Reiter is the father of the said A. H. Reiter; that the mortgage executed by appellees A. H. Reiter and Ida E. Reiter on the east half of section 14, township 9 north, range 18 west of the sixth P. M., in said county, was recorded in the office of the register of deeds March 6, 1930, being the $1,150 mortgage given by them to Sophie Legband; that the deed to the northeast quarter of section 8, township 10 north, range 18 west, in said county, was recorded in said office on the 15th day of March, 1930; that the deed to the east half of section 14, township 9 north, range 18 west, in said county, was recorded in said office on the 6th day of March, 1930; that appellee Sophie Legband is the mother of the said Ida E. Reiter and resides in Dodge county, Nebraska; that the indebtedness upon which said judgment was entered was evidenced by two promissory notes executed by appellee A. H. Reiter to the said American State Bank prior to the time of the filing of said petition; that said petition was filed in the district court for Buffalo county February 15, 1930, and that summons in said action was served on the said A. H. Reiter February 18, 1930; that the indebtedness on which the judgment was

based was incurred by Reiter on two different dates, the first being the 6th of March, 1929; that both notes were renewals of prior indebtedness and for new money received, and dated March 6, 1929, and June 4, 1929.

The material evidence, in addition to that contained in the stipulation which has been quite fully set out, discloses that in the spring of 1929 Herman G. Reiter loaned $1,000 to his son, A. H. Reiter. The check for $1,000 and the note he took from his son as evidence of this indebtedness were received in evidence. On March 4, 1930, this note was paid by a bill of sale covering certain chattels as set forth in the stipulation. Herman G. Reiter testified that he sold 10 head of the calves covered by this bill of sale for $292.95, net, and with the proceeds paid certain interest for the benefit of his son and other expenses, such as $25 attorney's fee to Fred Nye, and kept $20.15 of this money for himself. The remainder of the cattle and implements included in the bill of sale stayed in the possession of A. H. Reiter and he used the same and received the income therefrom with the permission of his father.

Ida E. Reiter testified that she and appellee A. H. Reiter were husband and wife and had been married for 15 years and lived on the northeast quarter of section 8, aforesaid, for the past 4 years; that said quarter was mortgaged for $4,000, and that she had inherited $5,291.23 from her father's estate when she was 18 years old and before she was married. She testified further that a $900 check made under date of March 22, 1915, was given by her to her husband; that he used some of it to pay on the land (it developed later on in the evidence that this money was used to buy stock and implements); further, that an $800 check which she gave to Cochran and Miller (exhibit 5) was used to pay on the southeast quarter of the land in question, and also that a $700 check, dated February 1, 1916, was used as a payment on the half section of land described in the stipulation; that on June 24, 1919, she gave a check to Colbert and Reynolds for $1,000 (exhibit 7); that this amount was applied on the purchase price of

the half section aforesaid. There was some dispute in the record as to whether or not this $1,000 was paid out of the account of Ida E. Reiter, and also a check for $800, known as exhibit 8. She testified that this money was taken from a bank in Snyder, Nebraska, and that she gave her husband a check in the first instance, he in turn taking it to the City National Bank in Kearney, she having indorsed it, this creating an account in his name, and that subsequently a check was made by her which he signed; that she placed her name below his signature on the check, and that certain other notations were made on the checks later to show what they paid; that the money evidenced by all of said checks came from her separate estate. The trial court accepted this explanation.

She testified further to conveyances made to her by her husband and the dates thereof, as stated in the stipulation. In referring to the deed to the half section given her by her husband in the spring of 1930, to the question, "Why was that made?" she replied, "I never had anything to show for what money I paid on it and I thought I ought to have something to show for it." To the question, "What consideration was named in that deed?" she replied, "Why, he allowed $3,000 paid on the land, but I actually paid more than that, but he called it $3,000." Concerning the deed she received from her husband for the home quarter, to the question, "Why was that made?" she replied, "Because I paid some money on it." Concerning exhibit 8, a check for $800, dated June 18, 1919, signed by A. H. Reiter, and under it the name of Ida E. Reiter, with a notation thereon, "Miller place," the witness testified that it was a payment to A. Nelson, an agent, and applied on the home quarter. Witness' passbook was received in evidence, showing deposits of $4,152.78 between March 29, 1915, and July 6, 1916.

The witness further testified that she knew her husband owed large sums of money to the bank; that she and her husband talked to one A. C. Wittera, trustee for the depositors' committee for the American State Bank of Kear-

ney, a few days before the conveyances were executed, and that she did not mention to Wittera at that time that her husband owed her anything, nor that the instruments of conveyance from her husband to her had been signed. She further testified to the loan of Sophie Legband to herself and husband in the sum of $1,150 and to the mortgage given to the said Sophie Legband for $1,150, subject to the $6,000 mortgage, on the east half of section 14, township 9 north, range 18 west, in Elm Creek township, and also to three smaller notes of $200, $300, and $600, respectively, payable to the said Sophie Legband and given by them, which notes were taken up March 30, 1930, and the note of $1,150 given in lieu thereof and secured by the mortgage above referred to.

A. H. Reiter testified to the bill of sale given to his father; that it was a valid indebtedness; and also to a written statement given the bank; that the items therein were put down by the banker; that he had no apparent knowledge of the statement but had signed it; denied that he made statements as to the value of the property, but answered questions as to the number and amount of cattle, hogs and corn, but not as to their values; that he was not asked whether he owed any money.

A. C. Wittera testified in rebuttal for appellants to the property statement given by the said A. H. Reiter, which was received in evidence, and to the values of the lands in question, they being from $25 to $35 an acre; that Mrs. Reiter had said nothing to him about A. H. Reiter owing her money, nor had A. H. Reiter said anything to him about his owing his wife money, or that Mr. and Mrs. Reiter were indebted to Mrs. Legband at the time.

A. H. Reiter called in rebuttal for appellees denied that he made the statement that the 320 acres of land in question were valued at $17,000 or that the 160 acres were worth $9,000, as portrayed by the statement to the bank, or that the implements were worth $500; that he was never asked about any indebtedness by the person taking his statement.

Witnesses for appellees, in fixing the value of the real estate, placed the value of the half section at $25 an acre and $30 to $35 an acre for the 160 acres of land.

The trial court found generally and specially in favor of each and all of the appellees.

From the statement of facts contained in the stipulation, the evidence of the witnesses and the findings of the trial court on the facts this appeal in equity comes to this court for a trial *de novo*, as provided by section 20-1925, Comp. St. 1929.

This court has held that, when the evidence on material issues so conflicts that it cannot be reconciled, this court will consider the fact that the trial court observed the witnesses, their manner of testifying, and must have accepted one version of the facts rather than the opposite. *Shafer v. Beatrice State Bank*, 99 Neb. 317; *In re Estate of Waller*, 116 Neb. 352.

Reversible error has not been pointed out, and it follows that the decree of the trial court must be, and is hereby,

AFFIRMED.

NEBRASKA STATE BANK OF NORFOLK, APPELLANT, V. SCHOOL DISTRICT OF CITY OF PIERCE, APPELLEE.

FILED FEBRUARY 5, 1932. No. 28026.

1. **Assignments.** Ordinarily, an assignee of a chose in action takes the same right as was possessed by, and subject to the same defenses and equities which could be enforced against, his assignor.
2. **Banks and Banking:** NOTICE. Knowledge of the president and managing officer of a bank will be imputed to such bank, where such officer is acting for and in the interest of his bank.
3. ———: DEPOSIT OF SCHOOL FUNDS: TRUSTS. A bank receiving a deposit of funds of a school district, in the hands of its treasurer, who is also president and managing officer of such bank, holds such funds as trustee for the district.
4. ———: ———: RIGHT OF SET-OFF. Where a bank, acting through its president and managing officer, who is at the same time treasurer of a school district, purchases warrants of the district drawn on such treasurer, which are irregular on their

face so that they are not entitled to registration by the treasurer, the bank in such case holds the claim represented by such warrant subject to the rights of the district to offset any claim it has against the bank.

APPEAL from the district court for Pierce county: DE WITT C. CHASE, JUDGE. *Affirmed.*

Shurtleff & Spillman, for appellant.

Douglas Cones and *M. H. Leamy, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and WRIGHT, District Judge.

WRIGHT, District Judge.

This action was brought by Nebraska State Bank of Norfolk, Nebraska, as plaintiff, against School District of the City of Pierce, Nebraska, defendant. During the course of the litigation, the bank became insolvent, and thereupon Clarence G. Bliss, as receiver of plaintiff bank, was substituted as plaintiff. The parties will be designated, as in the district court, plaintiff and defendant, respectively.

Plaintiff seeks to recover as assignee of 44 warrants drawn on the defendant's treasurer, each regular on its face except that, while it was signed by the secretary, it was not signed by the president or vice-president of defendant's board, as the statute requires. It is agreed by the parties that each was issued for the payment of a valid claim against the defendant which had been examined, approved and allowed by its board.

For five years immediately prior to March, 1928, Frank Pilger was the treasurer of defendant school district and also president and managing officer of the Pierce State Bank of Pierce, Nebraska, in which bank he deposited defendant's funds in his hands as treasurer.

It is clear that, under a custom of several years standing, the defendant's board had adopted a plan of issuing warrants for local claims signed only by its secretary, and that Pilger as treasurer had accepted these as sufficient.

The secretary testified: "The board authorized the secretary that when the wages of the teachers or the janitors and firemen at the end of the month came due that the secretary issue a warrant for their pay." These warrants were generally accepted and treated by the holders and banks in the city of Pierce as sufficient to insure payment by the treasurer. Of the warrants involved in this action, about two-thirds were first presented to one of the two banks in the city of Pierce, other than Pilger's bank, where they were treated and cleared as checks drawn on Pilger's bank. The remainder were presented directly to his bank and all were accepted and paid for from its funds. Thereupon Pilger placed upon the warrant his certificate as treasurer that the same had been presented to him for payment. No charge on the bank books was made against Pilger's account as treasurer, although there was then sufficient funds in the account to meet the payment. Pilger's bank then in each instance treated the warrant as a valid warrant belonging to it and sold the same to the plaintiff bank for face value, transferring it by indorsement and delivery in the same manner as was its custom in handling ordinary commercial paper. By this course of procedure, Pilger's bank retained the funds of defendant deposited with it, nor were the funds of the bank depleted for any considerable time, for it is agreed that the warrants were sold and Pilger's bank received credit therefor within 24 hours from the time the same were registered by Pilger as treasurer. In each instance, when the warrant involved was presented to the treasurer and by him registered, he had in his hands and under his control and had on deposit on open account in his bank funds of the defendant more than sufficient to pay the same; and the reserve of the bank on these occasions was sufficient to have paid the treasurer the sum on his check on demand. The treasurer, however, instead of paying the warrant from funds in his hands, undertook to purchase it for his bank.

The warrants of claims in suit were purchased by plaintiff bank in several lots between December 3, 1927, and

February 18, 1928, in the aggregate face value of $7,041.19. On March 5, 1928, the Pierce State Bank became insolvent and closed its doors. There was then on deposit in that bank on open account to the credit of Pilger, as treasurer of the defendant, the sum of $5,751.65, funds belonging to defendant and subject to the order of Pilger as its treasurer. Pilger resigned as treasurer on March 19, 1928. He refused and has failed to turn over to his successor any of the files or records of his office, or any money in his hands or under his control as treasurer; and no part of defendant's funds deposited in his bank when it closed have ben paid.

It was stipulated on the trial that, for more than three years prior to the time plaintiff purchased the warrants in question, the defendant had failed and neglected to audit the accounts of its treasurer or to require him to make a formal monthly statement in writing of the funds of the district or to exhibit or return the canceled, paid or receipted warrants or vouchers from the payees.

Under appropriate pleadings, the district court found that, at the time of the closing of the Pierce State Bank, the district had on deposit in that bank the sum of $5,751.65; that the aggregate amount of plaintiff's claims against the district was $7,041.19, which was based on school district warrants issued by the defendant district not countersigned by the school district president, and that therefore such warrants were void, and were not eligible to registration by the district treasurer; that the plaintiff was the assignee and owner of the original claims which formed the basis of each of these warrants; that the defendant district was entitled to an equitable offset against the total amount of said warrants in the sum of $5,751.65, the amount of the deposit in the Pierce State Bank at the time it closed, which was allowed, and thereupon judgment was entered for the difference between the amount of the claims and such offset, $1,289.54, from which the plaintiff has appealed.

It is conceded that the plaintiff purchased the warrants

without actual knowledge of the facts other than was disclosed by the instruments themselves, and it also seems fairly certain that the school board had no knowledge of the practice of registering and selling the same, but believed that they were being paid from the district's funds in the hands of the treasurer. The treasurer, however, had other plans. He was not only the trusted officer of the defendant, but also the president and managing officer of a bank which was interested in holding possession of defendant's funds. It needs no argument to demonstrate the interest his bank had in retaining these funds, nor can there be any serious doubt that throughout the whole course of his transactions he was acting in the interests of his bank and with little regard for those of the defendant. There is good authority for the proposition that "no man can serve two masters" and Pilger proved no exception to the rule.

There is little, if any, dispute as to the facts. The questions presented are: Did the plaintiff take as assignee subject to defenses the defendant might have against the Pierce State Bank? and, if so, did defendant then have the right to an equitable offset against the plaintiff for the amount of its deposit in that bank at the time it closed?

Plaintiff contends that, the warrants being irregular on their face, the treasurer could not legally pay the same; that it is in the position of assignee of the several claims, subject in its hands only to the equities in force between the original parties at the time it took the assignment, and not to equities accruing thereafter; that, being a remote assignee, it is not affected by equities between the maker and an intermediate indorsee where there could have been no defense to the action against the original payee, and inquires: "Does a nonnegotiable chose in action in Nebraska gather defenses as it rolls along, and must the next holder investigate the transaction between the payor and every intermediate indorsee?" Whatever the rule may be in other jurisdictions, we think this court has already determined that as a general rule it does. In *Henefin v. Live*

Stock Nat. Bank, 116 Neb. 331, where the question of right of an assignee of a chose in action was involved, the court expressly held: "Ordinarily, an assignee of a chose in action acquires no greater right than was possessed by his assignor, but simply stands in the shoes of the latter." We see no reason for declaring a different rule, and under the facts and circumstances here presented have no hesitancy in holding that the plaintiff, by its several assignments, took no greater right than that possessed by the Pierce State Bank and simply stands in its shoes. Where no rule of expediency or necessity controls, such as prompts some of the arbitrary rules pertaining to negotiable instruments, an assignee takes no greater or better right than his assignor. The supreme court of Illinois announces the same rule in *Commercial Nat. Bank v. Burch,* 141 Ill. 519, and in the course of the opinion say: "Each successive assignee of a chose in action takes it subject to the equities existing between the original assignor and his immediate assignee."

This, then, brings us to a consideration of the rights of the Pierce State Bank under which plaintiff claims. If, under the circumstances, the defendant could have asserted an offset against that bank, then it follows that plaintiff is subjected to the same right.

While it is a well-recognized rule that knowledge of an officer of a bank acquired while acting beyond the scope of his authority will not be imputed to the bank, we feel that under the circumstances in this case the knowledge of the treasurer, Pilger, who was president and managing officer of the bank, should be imputed to it. *Brownell v. Ruwe,* 117 Neb. 407; *State v. American State Bank,* 108 Neb. 92; *Emerado Farmers Elevator Co. v. Farmers Bank,* 20 N. Dak. 270. The entire management and control of the bank transactions, so far as the matters involved in this litigation go, were in his hands. While occupying the position of treasurer of defendant district, he placed in the hands of the bank the funds belonging to the district.

The bank, by receiving the deposit with knowledge that

it belonged to the defendant, held it as trustee for the school district. *State v. Midland State Bank*, 52 Neb. 1. All of Pilger's acts in the premises were in the interest of the bank in taking and keeping possession of the fund and in utter disregard of defendant's rights.

It is established beyond question that the defendant, in the issuance of the warrants in question, intended that the same should be paid from the funds held by the treasurer and, in fact, believed that this had been done. This had been the common practice between it and its treasurer. Warrants of this kind had been by him recognized as valid and charged against this fund and the board had been by deceit led to believe that all those presented had been paid. The purchase of these warrants was not intended to and did not benefit the defendant. There was no lawful authority in the treasurer to certify the fact of presentation for payment so that thereafter the warrant should draw interest, and where, under these circumstances, the treasurer made the certificate and then as president and manager undertook to make his bank a valid holder of the same, it gave the bank rights clouded by many doubts.

We have no doubt, had the Pierce State Bank brought suit on these claims, the defendant could have at least insisted that it apply trust funds in its hands and belonging to the defendant toward the satisfaction of the debt. It would seem, under the law and the equities of the case, that the relief granted by the district court covers all to which the plaintiff is entitled, and its judgment should be and is

AFFIRMED.

ROSE RESNICK ET AL., APPELLEES, V. PAUL KAZAKES, APPELLANT.

FILED FEBRUARY 10, 1932. No. 28094.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Clement L. Waldron and *David O. Mathews,* for appellant.

Lower & Sheehan and *H. L. Mossman, contra.*

Heard before ROSE, DEAN, GOOD and DAY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This action was begun by Rose Resnick and Hyman A. Resnick, husband and wife, in the district court for Douglas county to enjoin Paul Kazakes, the defendant, from permitting water to run from the roof of his two-story building upon a one-story building owned by them immediately adjacent to the Kazakes property. The plaintiffs prayed for an order requiring the defendant to remove a certain portion of his building which they allege encroaches upon their property. The defendant filed a cross-petition wherein he alleged that the walls and foundation of his building were damaged and weakened by the excavation by plaintiffs for their building. Upon submission, the court found for the plaintiffs and against the defendant and decreed that the defendant be permanently enjoined from maintaining an eave spout or cornice on his building and that he remove all of the projections except the brick wall. The court also found and decreed that the plaintiffs recover $700 as damages from the defendant. The defendant has appealed.

As herein pointed out, the property of the defendant joins that of the plaintiffs. The defendant's building was completed some time before the excavation was begun by the plaintiffs preparatory to the erection of their building.

A surveyor for the city of Omaha testified that the Kazakes building leaned toward the south from two and a half inches at the west end to about six inches at the east end and over the line, including the cornice on the top of the wall. The survey of another engineer is to the effect that the Kazakes building extends two inches over and upon the Resnick property in front, at the base line,

and that near the top the building projects over four and a half inches. He also testified that a gutter projects ten and a half inches. And the building inspector for the city testified that a shelf of concrete extended from the Kazakes building over and upon the Resnick property. He informed the plaintiffs that, under the building code of the city, it would be necessary for them to notify the defendant of their intention to excavate.

The contractor who constructed the Resnick building testified that, when the excavation therefor was completed with the exception of three to five feet near the Kazakes building, he informed Kazakes that he, the defendant, would have to support his building. He testified that the Kazakes foundation did not appear to be "firm work." The record discloses that the excavation for the Resnick building was delayed several weeks in order that the underpinning of the Kazakes building might be completed. From the evidence of this witness it also fairly appears that the Kazakes building settled from the fact that it was on filled ground, and not because of the excavation of the Resnick property.

There is evidence tending to prove that, in the event the Resnick building is extended to a second story in the future, the Kazakes building projects too far to permit the addition of such second story without considerable added expense. Evidence was also introduced tending to prove that water from the tile roof of the Kazakes building seeped through the walls of the Resnick building thereby damaging it to some extent.

On behalf of the defendant, the testimony of his brother discloses that the construction of the Kazakes building was supervised by the city and that the building was plumb at the time of its erection, although the tile roof thereon extended beyond the south edge of the building about two inches. Evidence was introduced tending to prove that the steam shovel used in the excavation for the Resnick building had struck the Kazakes building, thereby weakening the walls to some extent. Witnesses for the plaintiffs on rebuttal, however, denied that the steam shovel at any time struck the wall.

The evidence in respect of some of the material facts is contradictory, but we do not think the court erred in relying on the testimony of plaintiffs' expert witnesses. Upon appeal in actions in equity the issues are to be tried *de novo*, but it is elementary that where the facts are in irreconcilable conflict, as in the present case, this court will take notice of the fact that the trial court heard the witnesses and observed their demeanor while testifying, and had a better opportunity to judge of the weight of the evidence than has a reviewing court on appeal. *Gaunt v. Smith*, 103 Neb. 506; *Greusel v. Payne*, 107 Neb. 84.

It clearly devolved upon the defendant to provide the proper support for his building where timely notice of the plaintiffs' intention to excavate for a building on the adjoining lot was given. And the plaintiffs are not liable in damages to the defendant for the alleged weakening of the walls of the defendant's building where it is shown that the plaintiffs used due care in their excavation. *Wahl v. Kelly*, 194 Wis. 559; *Christensen v. Badger Improvement Co.*, 187 Wis. 598. And where the evidence fairly shows that the defendant's building encroaches upon the land of plaintiffs through no fault of theirs, they are entitled to have such parts of the defendant's building as encroach upon their land removed. The evidence also discloses that the defendant wrongfully cast water from his building upon that of the plaintiffs' and that in consequence thereof plaintiffs have suffered damages in an amount equal to that found by the trial court herein. The judgment is

AFFIRMED.

FRED OLSON, APPELLEE, V. MILO HANSEN, APPELLANT: LLOYD TEXLEY, APPELLEE.

FILED FEBRUARY 10, 1932. No. 28125.

1. **Torts: JOINT AND SEVERAL LIABILITY.** "An act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally." *Schweppe v. Uhl*, 97 Neb. 328.

2. Trial: INSTRUCTIONS. "Where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is error to submit such issue to the jury." *Koehn v. City of Hastings*, 114 Neb. 106.
3. ———: ORDER OF PROOF. Ordinarily, a party who would be defeated if no evidence were given on either side must first produce his evidence and rest. Comp. St. 1929, sec. 20-1107.
4. ———: ———: DISCRETION OF COURT. The trial court is invested with a wide discretion in allowing an alteration of the ordinary rules of practice and procedure as to the time and order in which evidence shall be introduced.
5. Appeal: HARMLESS ERRORS. Errors in proceedings, not affecting the substantial rights of an adverse party, will not work a reversal of the judgment.

APPEAL from the district court for Madison county: CHARLES H. STEWART, JUDGE. *Affirmed.*

Frederick M. Deutsch and *H. E. Siman*, for appellant.

Carl H. Peterson and *Webb Rice, contra.*

Heard before GOSS, C. J., DEAN and PAINE, JJ., and BROADY and RHOADES, District Judges.

GOSS, C. J.

Plaintiff had judgment against defendants for injuries received when the automobile of defendant Texley collided with plaintiff's team and mower on which he was riding along a public highway. Defendant Hansen appealed.

There was evidence from which the jury might find as follows: Late in the forenoon of September 29, 1930, plaintiff was driving south on the right side of the road ascending a small hill or knoll. Hansen and Texley in the order named were driving their separate cars north. Hansen recognized plaintiff and suddenly either stopped his car or had it nearly stopped to visit with plaintiff when the collision occurred. Texley had followed Hansen's car about a mile and had come up to a position near it some time before the collision. He was driving 30 to 35 miles an hour. The road, which was of dirt, had been newly graded a few days before. Hansen's car was 35 to 45 feet ahead of Texley, about at the top of the hill or knoll,

and commencing to go down, when Texley saw Hansen was slackening his speed or about to stop, as indicated by his red stoplight. Texley undertook to go around Hansen. Some part of the right side of Texley's car struck the left rear of Hansen's car, and then Texley's car struck the mower, throwing plaintiff into the ditch west of the road, breaking plaintiff's leg and otherwise injuring him. There was evidence from which the jury might find that Hansen had stopped or was just stopping his car so that its left side was west of the middle of the highway and that there was not sufficient room between Hansen's car and plaintiff's rig for Texley to pass.

Briefly stated, the petition charged concurrent negligence of defendants, in that Hansen brought his car to a sudden stop in such a position as to block the highway instead of pulling over to the right of the road, and that Texley failed to have his automobile under control, operated it at a greater speed than was proper in the circumstances, and negligently attempted to pass Hansen's car while so approaching plaintiff's team and mower.

The assignments of error that the judgment against Hansen is not sustained by the evidence and that the court should have sustained his motion for a directed verdict raise the question as to whether a case of concurrent negligence of Hansen and Texley was made out. "An act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally." *Schweppe v. Uhl*, 97 Neb. 328. "If one suffers injury and damage as the proximate result of the negligence of two others, and the damage would not have occurred but for the negligence of each of such parties, both are liable to the person so injured." *Koehn v. City of Hastings*, 114 Neb. 106. Both of the above cited cases arose out of the use of automobiles resulting in personal injuries. In the first case the operators of seven cars in an advertising procession were sued and held in damages for causing horses of the plaintiff to be frightened as the cars passed plaintiff

driving his team on the highway. In the second case only the city, as owner of an automobile improperly parked, was sued, though the evidence indicated concurrent negligence of the driver of a taxicab in which plaintiff's decedent was riding. The rule is stated, and cases are cited, in 2 Blashfield, Cyclopedia of Automobile Law, p. 1493, sec. 5, as follows: "When the negligence of any person concurs with that of another to constitute the proximate cause of an injury, they may be held either jointly or severally, and either is chargeable as if solely responsible for such cause, this being true, though the acts of negligence are independent of each other, and the comparative culpability of the two will not affect the joint and several liabilities of either." The same rule is followed in *McDonald v. Robinson*, 207 Ia. 1293, 62 A. L. R. 1419, where, beginning on page 1425, is a valuable annotation as to concurring negligence of drivers of automobiles and as to their liability to third persons.

While there is some conflict in the evidence, it amply supports a verdict and judgment against both defendants because of the concurrence of their negligent acts as the proximate cause of plaintiff's injuries. The judgment must be affirmed unless otherwise required by errors assigned.

Hansen assigns error because the court did not instruct the jury on the question of the contributory negligence of plaintiff. We do not find, nor does Hansen point out, any competent evidence of any negligence of plaintiff, who, with his team and mower, occupied only his own side of the road. It is suggested by appellant, in arguing this assignment, that plaintiff should have avoided the danger by pulling his team and rig over to the right on the shoulder of the road when he saw the coming Texley car. At that instant events happened quickly. Hansen suddenly slowed his car to stop. Then Texley swerved left to pass Hansen. In the circumstances there was no error in refusing to predicate contributory negligence upon plaintiff's failure to get a team of mules drawing a mower uphill at the rate of three miles an hour out of the way of Texley

going ten times as fast. It is the rule that, "where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is error to submit such issue to the jury." *Koehn v. City of Hastings,* 114 Neb. 106.

The court gave to the jury six instructions out of twelve requested by appellant and gave twenty instructions on the court's own motion. In one of the latter he told the jury they were all instructions of the court and they should give to those requested the same consideration as the others. The instructions necessary for the guidance of the jury were given. Error is severally assigned because of the court's refusal of six of the instructions requested. To discuss them fully would unduly extend this opinion. We have considered them. They were either covered in the instructions given or contained matter prejudicial to the legal rights of one or the other parties to the suit.

At the conclusion of the testimony of witnesses on behalf of plaintiff, the court permitted plaintiff to rest as against defendant Texley, but to reserve his rest against defendant Hansen until Texley was examined by his separate counsel. Hansen's objection to this procedure was overruled. Thereupon Texley was examined by his counsel, was cross-examined by both other parties, and plaintiff rested generally. Under the statute and the state of the pleadings it was the duty of plaintiff to produce his evidence first. Comp. St. 1929, sec. 20-1107. Conventionally he should then rest his case. The reasons given the court on behalf of plaintiff when the court granted the request to reserve the rest against Hansen included one to the effect that it was because of things said by counsel for Hansen and by counsel for Texley, respectively, in the opening "statement of his counsel to the jury." Those statements were not preserved in the bill of exceptions and so we do not know in its entirety what influenced the court in exercising a discretion to grant the request. Jones, Commentaries on Evidence (2d ed.) sec. 2502, says: "The trial court is, of necessity, invested with a wide dis-

cretion in regard to ordering or permitting an alteration of the ordinary rules of practice and procedure at trials and the time and order in which evidence shall be introduced." And section 2510: "The rulings of the trial judge upon these matters are not, as a rule, reversible for error." While, generally, one who produces a witness impliedly recommends him as worthy of belief (*Nathan v. Sands*, 52 Neb. 660) yet a perusal of the testimony of defendant Texley, whose testimony was produced by himself rather than by plaintiff, does not convince us that his codefendant Hansen has been prejudiced because plaintiff did not produce the particular witness. The evidence on behalf of each defendant seemed to be calculated to cast the liability on the other rather than to defeat the plaintiff's recovery from the other. Moreover, the mandate of section 20-853, Comp. St. 1929, requires us to disregard any error in the proceedings which does not affect the substantial rights of the adverse party. So, while not commending the practice followed by the trial court, we find it was not such a prejudicial use of the court's discretion as to warrant a reversal of the judgment.

We find no error in the court's refusal to grant a mistrial arising out of or connected with the alleged misconduct of a juror; nor do we find prejudicial error in the conduct of counsel for plaintiff in the argument to the jury.

Error is charged in relation to the matter of insurance. During the trial Leo Blank, who was riding with Texley when the accident occurred, and who was a witness for Texley, testified he had gone to a farmhouse to call a doctor and then followed the others who had taken Olson home; that, while he, Hansen and Texley were standing outside waiting for the doctor to come, Hansen said it was his fault, that he had stopped in the middle of the road, and that Mr. Texley had nothing to worry about because he had the insurance company's car, which was covered by insurance, and he also had insurance on it. Hansen himself testified that his defense was made for him by an insurance company and that he was a field

representative of the general agency that has the particular indemnity company. During the argument to the jury some heat developed over statements by counsel for all three parties respecting the subject of insurance. The court ruled that arguments must be confined to the evidence and proper deductions therefrom. From the meager record of the argument, we do not discover that there was misconduct in this matter in view of the testimony to which we have referred above. However, the court gave the jury a written instruction to decide the case solely on its merits under the law, without reference to the question of whether or not there were insurance interests involved, which, he said, had nothing whatever to do as to who, if any one, was at fault in the matter. There was no prejudicial error as to insurance.

The verdict and judgment for $10,000 are attacked as excessive. Plaintiff, 43 years of age at the time of the trial, was living on a rented farm. Before the injury he had been well and strong. His patent personal injuries consisted of two oblique fractures of his right leg, one near the ankle and another below the knee, and of a bruising and numbness of his right arm. His back was sprained, and at the time of the trial—nearly nine months after the accident—he testified it had been hurting him ever since. He also testified that, while he was not so troubled before the injury, yet afterwards he has had to arise from two to four times during the night to relieve his bladder, and that from a sound sleeper the pain in his leg has caused him to be a poor sleeper. There was a good union of the bones. His appetite was subnormal and his weight had been reduced from 160 to 137 pounds. His right leg was shortened one-fourth or three-fourths of an inch, depending on the testimony of two doctors who measured it. He was totally disabled 137 days. His ability to work was still considerably impaired at the time of the trial. Without giving the details, it is sufficient to say that his expenditures and obligations for surgical and hospital services and the injury to his team and mower, for which he

also sued, amounted to considerably less than $1,000. The verdict was admittedly large for the damage resulting from the fractures and the property loss. If that reflected all of plaintiff's damage we might feel disposed to order a remittitur. But in view of the state of the evidence as to his loss of weight, his lessened power to sleep and to work, and his bladder trouble, we are not disposed to disturb the judgment of the court, where the trial judge had an opportunity to observe the plaintiff.

The judgment of the district court is

AFFIRMED.

GEORGE O. MONROE, APPELLEE, V. F. H. PARKER ET AL., APPELLANTS.

FILED FEBRUARY 10, 1932. No. 28130.

Bills and Notes: CONDITIONAL DELIVERY: PAROL EVIDENCE. Under the provisions of section 62-116, Comp. St. 1929, the delivery of a promissory note may be shown to have been conditional or for a special purpose only, and where the allegations of the makers' answer pleaded such defense and it was sought to prove such allegations, *held*, that the court erred in refusing to admit such testimony.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Reversed.*

Fradenburg, Stalmaster & Beber, Oscar T. Doerr and *P. N. Klutznick*, for appellants.

Battelle, Travis & Strehlow, contra.

Heard before GOSS, C. J., DEAN and PAINE, JJ., and CARTER and RHOADES, District Judges.

DEAN, J.

This action was begun in the district court for Douglas county by George O. Monroe to recover $1,500 upon a promissory note, dated September 24, 1928, and executed and delivered to Monroe by the defendants F. H. Parker and William C. Raapke. The note by its terms is payable

two years after date and bears interest at the rate of 10 per cent. per annum thereafter. A jury was waived and the case was tried to the court. Upon plaintiff's motion the court rendered a judgment in his favor for $1,780 and from the judgment so rendered the defendants have appealed.

The defendants assign as error the ruling of the court in sustaining plaintiff's objection to the introduction of evidence by the defendants on the ground, as stated by the court, that the proposed evidence was "not a proper defense to this note." It was stipulated by the parties that, were other witnesses to testify in behalf of the defendants, their testimony would substantiate the facts pleaded in the answer, and that the same ruling would be made by the court to objections interposed thereto by the plaintiff.

In their answer the defendants allege that the plaintiff, with others, was the owner of all the stock in the Omaha Suburban Theatres, incorporated, and that the corporation operated the Military Theatre in Omaha; that the corporation was in danger of losing its equipment through certain obligations which were then due and unpaid; and that the defendants, with a view of assisting the plaintiff and his associates out of such financial difficulties, received an assignment of 121 shares of stock therein. It is also alleged that, by reason of the financial difficulties of the corporation, the defendants personally advanced large sums of money, but that, notwithstanding such advancements so made, the corporation became insolvent. The defendants allege that the parties did not intend that any personal obligation should be created nor that the defendants would ever be required to meet the payment of the note in suit, and they contend that this note, with others, was executed by them to plaintiff, without consideration, and that the stock was assigned to such defendants merely to lend personal credit to the plaintiff and for no other purpose or consideration whatsoever.

Section 62-116, Comp. St. 1929, so far as applicable here, contains the following provision:

"Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party, other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only."

As noted above, the defendants alleged that the note in suit was given conditionally and for a special purpose, and they endeavored to prove the allegations contained in their answer by testimony offered in support thereof. The court, however, sustained practically every objection made thereto by the plaintiff.

In *Witte v. Broz,* 111 Neb. 76, we held:

"Under the provisions of the negotiable instruments act, section 4627, Comp. St. 1922, as between the immediate parties and as regards a remote party other than a holder in due course, the delivery of a negotiable instrument may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument."

And in *People's State Bank v. Smith,* 120 Neb. 29, we also held:

"In an action on a promissory note between the immediate parties thereto, testimony tending to prove the purpose for which a note is given does not violate the 'parole evidence rule.' Such evidence is specifically admissible under the negotiable instruments law. Comp. St. 1922, sec. 4627."

Under the provisions of section 62-116, Comp. St. 1929, the delivery of a promissory note may be shown to have been conditional or for a special purpose only, and where the allegations of the defendants' answer pleaded such defense and it was sought to prove such allegations by the testimony of the defendants' witnesses, the court erred in refusing to admit such testimony.

We conclude that, in view of the record and the law applicable thereto, the judgment must be and it hereby is reversed and the cause remanded for further proceedings consistent with the views herein expressed.

REVERSED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLEE, V. FIRST STATE BANK OF ALLIANCE: NATIONAL SURETY COMPANY, INTERVENER, APPELLANT.

FILED FEBRUARY 10, 1932. No. 28139.

1. **Banks and Banking**: DEPOSIT OF COUNTY FUNDS. Pursuant to the provisions of section 77-2506, Comp. St. 1929, county treasurers are authorized to deposit county funds in banks only as a general and not as a special deposit, and are required to take as security for such deposits a pledge of assets of the banks or a depository bond.
2. ———: ———. A state bank, receiving a deposit of county funds, pursuant to the provisions of section 77-2506, Comp. St. 1929, and securing such deposit by the pledge of assets and the giving of a depository bond, does not hold such deposit as a trust fund.
3. ———: ———: GUARANTY FUND: PREFERENCES. Where a county deposits its funds in a state bank and exacts as security therefor a pledge of some of the bank's assets, and also exacts a depository bond as further security, such deposit is one otherwise secured and is not entitled to share a lien on the assets of the bank on an equality with depositors in a class not otherwise secured.
4. **Statutes**: CONSTRUCTION. "Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." 25 R. C. L. 957, sec. 213.
5. **Constitutional Law**: POWERS OF LEGISLATURE: CLASSIFICATION. "The legislature has power to make reasonable classifications of persons and objects for the purposes of legislation affecting diversely the different classes." *State v. First State Bank*, *ante*, p. 109.
6. ———: ———: BANKS AND BANKING: CLASSIFICATION OF DEPOSITORS. "Legislative classification of depositors in state

banks for the purpose of determining priority of claims in the event of insolvency *held* valid." *State v. First State Bank, ante*, p. 109.

7. ———. Section 8-1,102, Comp. St. 1929, violates neither the state Constitution, prohibiting special and class legislation, nor the Fourteenth Amendment to the federal Constitution, guaranteeing equal protection of the laws.

APPEAL from the district court for Box Butte county: EARL L. MEYER, JUDGE. *Affirmed.*

Crofoot, Fraser, Connolly & Stryker, for appellant.

F. C. Radke, Barlow Nye, M. Craft Radke and *C. M. Skiles, contra.*

Howell, Tunison & Joyner, amici curiæ.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

GOOD, J.

From a judgment of the district court, classifying the claim of intervener against defendant, an insolvent state bank, as a general rather than a preferred claim, intervener has appealed. There is no controverted issue of fact. Only questions of law are involved.

The defendant bank became insolvent and was placed in the hands of a receiver in February, 1930. At the time the bank became insolvent Box Butte county had on deposit in the bank $28,961.67. The bank had secured this deposit by the pledge of $10,000 in liberty bonds and three depository bonds, one of which, for $8,500, was furnished by intervener. The liberty bonds have been sold and applied on the amount of the deposit. Intervener has paid to the county the amount of the bond and has taken from the county an assignment of its deposit account to the extent of $8,500. Intervener filed with the receiver its claim, based on the assignment, asking its allowance as preferred, first, as a trust fund and preferred over claims of depositors, and, in the event the court does not so allow it, that it be classified as a valid preferred depositors' claim.

Intervener contends that county funds, derived from the collection of taxes, are trust funds in the hands of the county treasurer; that a bank receiving same for deposit, with such knowledge, must account for the same as trust funds, and that claims for such trust funds are entitled to payment before the payment of claims of other depositors. In support of this contention, intervener cites section 77-2506, Comp. St. 1929, which, in part, provides that the "county treasurer of each and every county in the state of Nebraska shall deposit, and at all times keep on deposit for safe-keeping in the state, national or private banks doing business in the county, and of approved and responsible standing, the amount of moneys in his hands collected and held by him as such county treasurer." The statute also provides for the payment of interest by the bank upon funds so deposited. It is argued that the words "for safe-keeping" indicate a purpose to make it a special deposit or bailment, and that the identical funds shall be kept and preserved and returned or paid out on warrants issued by the county.

Of what value would a deposit be to a bank if it could not use the same and loan money so deposited? By what process of reasoning can it be supposed that any bank would pay interest upon a special deposit which it was not permitted to use but was required to keep separate and apart from other funds of the bank and be liable therefor without any compensation for the safe-keeping of the fund? The question answers itself. Moreover, intervener in its brief makes this statement: "That the interveners, by executing and delivering their depository bonds to Box Butte county, preserved the assets of the defendant bank by causing Box Butte county to keep on deposit in the bank large sums which were vital to the actual continuance of the bank." How could such funds be vital to the continuance of the bank if it had no use of them? Furthermore, in *Shambaugh v. City Bank of Elm Creek*, 118 Neb. 817, speaking of the authority of county treasurers to make deposits in banks, it is held: "Under the

terms of the statutes referred to, general deposits alone are authorized to be made in county depositories by county treasurers, and such, the evidence discloses, were made in the instant case." Clearly, the statute authorizes the county treasurer to place the county funds in his hands in depository banks on general deposit and provides for taking security therefor. The title to the moneys or other credits deposited passes to the bank and may be used by it as other funds deposited in the bank. It follows that the bank did not hold the deposit as a trust fund, and the court properly so determined.

Intervener contends that, as assignee of the county, it was subrogated to the latter's rights and was entitled to have its claim classified as that of a depositor, notwithstanding the provisions of section 8-1,102, Comp. St. 1929. That section, in part, provides: "The claims of depositors, for deposits, not otherwise secured, * * * shall have priority over all other claims, except federal, state, county and municipal taxes, and subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership." Prior to the amendment of the statute in 1925 it read: "The claims of depositors, for deposits, * * * shall have priority," etc. Intervener makes this contention: "That part of paragraph 8-1,102, Comp. St. Neb. 1929, 'not otherwise secured' was intended to cover a situation where a bank has deposited some of its securities as collateral to secure a deposit as distinguished from the depositor having security from an outside source; and also to cover a situation where a bonding company takes collateral from the bank to protect itself, or the assets of the bank are reduced by the pledging of securities with the bonding company, to induce it to execute a depository bond." It is argued that the words "not otherwise secured" were intended solely for the protection of the guaranty fund (now the depositors' final settlement fund).

We do not think the contention sound. It was the in-

tention of the legislature, as expressed in plain language, to classify deposits into two classes, those secured and those unsecured. A deposit in a state bank secured otherwise than by the bank pledging its securities or giving a depository bond is not here involved nor decided. The words "not otherwise secured" were inserted in the statute after numerous holdings by this court to the effect that, where a surety on a depository bond had paid the amount to the depositor, it was subrogated to the rights of the depositor and was entitled to have its claim allowed as preferred and payable out of the depositors' guaranty fund. Among the cases so holding are *State v. Kilgore State Bank*, 112 Neb. 856; *State v. State Bank of Gering*, 114 Neb. 213; *State v. Farmers & Merchants Bank*, 114 Neb. 217; *Rogers v. National Surety Co.*, 116 Neb. 170. However, since those decisions were rendered, the statute has been amended as above noted, and the question now is: Would the county have been entitled to have its claim preferred as that of an ordinary depositor, when it had taken security both by pledge of assets from the bank and by depository bonds given by the bank? Clearly, the language of the statute forbids.

An applicable rule is found in 25 R. C. L. 957, sec. 213, which reads: "A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself."

Other states having laws for the guaranty of bank deposits have enacted statutes providing that deposits, otherwise secured, are not protected by the guaranty fund; and the phrase "not otherwise secured" has been the subject of judicial discussion in other jurisdictions. Kansas had such a law, and in *American State Bank v. Wilson*, 110 Kan. 520, decided in 1922, it was determined that any

deposit in the bank which was secured by the bank was not within the protection of the guaranty fund act. Mississippi also had such a law, and in *Board of Levee Commissioners v. Love,* 147 Miss. 183, it was held that deposits, secured by marketable securities and personal bonds, were otherwise secured, under the statute, and were not entitled to participate in the guaranty fund. It was further held that, although the security was inadequate, still the deposit was not within the protection of the guaranty fund. The Kansas decision was published long before the amendment by the legislature of Nebraska, inserting the words "not otherwise secured." No doubt, the legislature of this state placed this phrase in the statute, mindful of the meaning given to it by the supreme court of Kansas.

This court had under consideration the effect to be given this statute in the case of *State v. First State Bank, ante,* p. 109. It was there held: "A city that exacts from a state bank collateral security for deposits, receives the proceeds of the security after insolvency of the bank and presents to the receiver a claim for excess of deposits over such proceeds, is in the class of depositors 'otherwise secured' and not entitled to share the assets of the bank on an equality with depositors in the class 'not otherwise secured,' within the meaning of the statute providing that depositors and holders of exchange in the latter class shall have the first lien." We find no reason to depart from or modify this ruling. It follows that if the statute is valid intervener's claim is not entitled to the same classification as "deposits, not otherwise secured."

It is argued that if the statute is held to mean what its plain language imports then it is special or class legislation and inhibited by the state Constitution; further, that it denies to intervener the equal protection of the law, in violation of the Fourteenth Amendment to the federal Constitution; and that to deny to intervener the same protection as depositors not otherwise secured is inequitable and unjust.

"The banking business, carried on pursuant to a state charter, is quasi-public and, for protection of the public and in its interests, is subject to reasonable regulation by the state." *Citizens State Bank v. Strayer,* 114 Neb. 567. Many years ago the state, by its legislature, in the exercise of its power, undertook to regulate the banking business. It provided that state banking business could only be carried on by duly licensed corporations. It provided for the guaranty of bank deposits by ordinary depositors, and that, upon insolvency of a bank, the depositors and holders of exchange should, subject to certain exceptions, have a first lien on all assets of the bank. It later provided that a depositor, receiving more than a stipulated rate of interest, should not be entitled to this lien, nor to the protection of the depositors' guaranty fund. Later, it enacted the provision which deprived any depositor, whose claims for deposit were otherwise secured, of the right to participate in the guaranty fund or of a first lien on the assets of the bank; and subsequently denied such a depositor the right to participate in the depositors' final settlement fund.

It seems reasonably clear that the legislature was attempting to create a state banking system and to reasonably insure depositors of the safety of funds deposited in state banks, if deposited under certain conditions. The state evidently desired to encourage its citizens to use a state bank and to deposit their funds therein, and, to some extent at least, insure the safety of such deposits if made pursuant to the provisions of the law. It must be observed that no depositor was required to deposit his funds in such a bank, but if he voluntarily did so, in compliance with the law, he would be entitled to the protection; but that, unless he came within the stipulated provisions, he should not be entitled to the same protection.

The rule is well established that "The legislature has power to make reasonable classifications of persons and objects for the purposes of legislation affecting diversely the different classes." *State v. First State Bank, supra.* In

that case it was further held: "Legislative classification of depositors in state banks for the purpose of determining priority of claims in the event of insolvency *held* valid." It seems clear that one who deposits funds in a state bank, relying solely on the solvency of the bank, and, in case of insolvency of the bank, he should have a first lien on the assets and be entitled to participate in the depositors' final settlement fund, is in a distinct class from those persons who are unwilling to make deposits in this manner, but who insist upon receiving from the bank either a pledge of some of its assets as security, or a depository bond from the bank as a guaranty of their deposits. We are satisfied that there is sufficient distinction in the classes to make the classification a valid one, and we adhere to the rule announced in *State v. First State Bank, supra.*

In this connection, it may be observed that a brief *amici curiæ* has been filed in this case, which contends that where a depositor takes an indemnity bond to secure himself, and pays for the bond, and such bond is not paid for by the bank, nor any assets of the bank pledged, either to the depositor or to the surety on the bond, he is entitled to participate in the lien granted to depositors, not otherwise secured, and to participate in the depositors' final settlement fund. That question is not involved in this case and is not here decided. In the instant case there were both a pledge of assets by the bank to the depositor and depository bonds furnished and given by the bank to the depositor.

We are unable to perceive wherein the statute violates the equal protection clause of the Fourteenth Amendment to the federal Constitution. The surety on the depository bond received a premium from the bank for executing the bond. It was aware of the fact that the county had taken a pledge of some of the bank's assets for the protection of the county's deposit, and it also accepted from the bank a depository bond, with intervener as surety. Intervener had the right to demand from the bank a pledge of assets to secure it, or it could have exacted such premium as it

deemed adequate to compensate it for the liability incurred. The statute operates alike on all in each class. In our opinion, the statute does not violate the equal protection clause of the Fourteenth Amendment to the federal Constitution; nor do we perceive wherein it is unjust or inequitable. Intervener is in a similar position to one who loans money and takes no security, although he might have refused to lend the money without security being given. If he chose to lend the money without security, he cannot complain if others, by operation of law which was in force at the time he made the loan, obtain a first lien upon the assets of his debtor.

We are constrained to hold that the judgment is not vulnerable to any of the attacks made upon it.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLEE, V. FIRST STATE BANK OF ALLIANCE: NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY, INTERVENER, APPELLANT.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLEE, V. FIRST STATE BANK OF ALLIANCE: AMERICAN EMPLOYERS' INSURANCE COMPANY, INTERVENER, APPELLANT.

FILED FEBRUARY 10, 1932. NOS. 28140, 28141.

APPEAL from the district court for Box Butte county: EARL L. MEYER, JUDGE. *Affirmed.*

Crofoot, Fraser, Connolly & Stryker, for appellants.

F. C. Radke, Barlow Nye, M. Craft Radke and *C. M. Skiles, contra.*

Howell, Tunnison & Joyner, amici curiæ.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

GOOD, J.

The above entitled causes involve precisely the same legal questions that are discussed and decided in *State v. First State Bank of Alliance, ante,* p. 502, and, together with that case, were briefed and argued in this court.

For the reasons given in the latter case, the judgment of the district court in each of the above entitled causes is

AFFIRMED.

THOMAS H. WALKER, APPELLANT, V. BEE-NEWS PUBLISHING COMPANY, APPELLEE.

FILED FEBRUARY 10, 1932. No. 28132.

1. Libel: DEFENSE. A newspaper cannot avoid responsibility in a libel suit by proving that a reporter, by mistake, used the wrong person's name. The real question is not, at whom was the article aimed, but whom did it injure.
2. ———: ———: NEGLIGENT WRONGS. In such cases, the law looks at the tendency and consequences of the publication, and not at the intention of the publisher, who may be held to answer for negligent wrongs, as well as those that are intentional.
3. ———: WORDS LIBELOUS PER SE. Words are libelous *per se* when they charge a criminal offense involving moral turpitude, but to state in error that a wrestling match was held in one's barn does not constitute such libel.
4. ———: ———. Words are libelous *per se* when they charge an offense which blackens one's character and exposes him to public ridicule, but the evidence in this case fails to sustain that charge.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Affirmed.*

R. H. Olmsted, for appellant.

Kennedy, Holland & De Lacy, contra.

Heard before GOSS, C. J., DEAN and PAINE, JJ., and BROADY and RHOADES, District Judges.

PAINE, J.

This is a libel suit, in which Thomas H. Walker, appellant, sought to recover $10,000 damages from the Bee-

News Publishing Company, of Omaha, appellee. The court, at the close of the testimony, and after each party had rested, sustained the motion of the appellee for a directed verdict.

Upon March 29, 1929, the Bee-News published in its home edition a large flashlight picture, reaching across four columns, showing a wrestling match in a barn loft. The picture shows some 40 people, including a number of girls, all much interested in the bout. The large-type headline above the picture reads: "Battle in Barn-Days of Old Live Again." In the half-column news write-up under the picture, we find this paragraph: "In Tom Walker's barn, west of Florence, two 'rasslers' rasseled it out Wednesday night. John Hodges of Tech. high, state heavyweight champ, took on John Sheppard, negro, who takes care of pots and pans at a downtown café." To attract attention to this unimportant event, a semi-ludicrous write-up described the meet, at which no admission was charged, and added: "The crowd had a swell time. It proved it by tossing, in the old-time way, $18.31 to the mat, which was divided between the pot massager and the high school student." This libel suit is brought because the reporter inadvertently was in error in stating that the event occurred in "Tom Walker's barn," whereas it was actually held in the barn of D. H. Walker, a few miles away. Appellant contends that said publication was wholly false, and injured appellant's good name and reputation as a citizen, husband and father, and subjected him to ridicule, ignominy and shame.

It is insisted that the large-type heading, heretofore set out, must first be considered, but we find nothing therein libelous. *Sheibley v. Nelson,* 75 Neb. 804; *Fitch v. Daily News Publishing Co.,* 116 Neb. 474.

1. 2. Where one's name is used by mistake, it has been held that there would be no right of action for libel, although the article would be libelous if it was intended to refer to him. Such was the holding in *Hanson v. Globe Newspaper Co.,* 159 Mass. 293, 20 L. R. A. 856. However,

in examining this case, which was decided in 1893, we find a very vigorous dissenting opinion of Justice Oliver Wendell Holmes, then a member of the Massachusetts supreme court. The news article described the conduct of a prisoner under arrest, and named him as H. P. Hanson, a well-known real estate broker, of South Boston. The man who was actually under arrest and fined was A. P. H. Hanson. Justice Holmes, who was not alone in his dissent, insisted that, if an article should allege falsely that A murdered B with a knife, it would not be a very satisfactory answer to a question by A that the article was a description of the conduct of the murderer of B and was true concerning that murderer. He insists that the words used in the article describe the plaintiff, H. P. Hanson, and no one else, and, while the defendant did not intend them to apply to him, the question narrows down to whether such want of intention is enough to constitute a defense against an action for libel, and he cites many early cases from the English courts which hold that one is responsible for negligent wrongs, as well as for those which are intentional.

The leading English case upon this point appears to be *E. Hulton & Co. v. Jones* (1910) App. Cas. (Eng.) 20, 79 L. J. K. B. 198, 16 Am. & Eng. Ann. Cas. 166. E. Hulton & Co., owners of the Sunday Chronicle, in publishing an article concerning the crowds at a motor race at Dieppe, purported to describe the doings and behavior of various types of Englishmen abroad, and the defamatory portion of the article referred to Artemus Jones, a supposedly fictitious person, but there really existed a Mr. Artemus Jones, a barrister, who had in times past published articles over his name in this same Sunday Chronicle. He at once sued for libel, and a jury at Manchester returned a verdict of 1,750 L. (pounds) damages. On appeal, Lord Alverson, C. J., of the court of appeals, reached the same conclusion as Justice Holmes did in *Hanson v. Globe Newspaper Co., supra,* and affirmed the judgment. There being dissent, it was taken to the House of Lords, where, upon

December 6, 1909, it was held that, in an action for libel against the owners of a newspaper who published a defamatory article containing plaintiff's name, the fact that neither the writer of the article nor the editor of the paper had ever heard of the plaintiff, and had no intention of referring to him, and believed the name referred to an imaginary person, was no defense if the circumstances were such that persons who read the article would reasonably think that the language referred, not to an imaginary person, but to a real person, and that those among them who knew the plaintiff would reasonably suppose the language to refer to him.

In Colorado and Kansas cases, it was held: "The fact that neither the reporter nor anybody else connected with the newspaper knew the plaintiff is immaterial to the right to recover. * * * Intent is immaterial except as a part of express malice." *Switzer v. Anthony,* 71 Colo. 291. See *Hatfield v. Gazette Printing Co.,* 103 Kan. 513. Judge Pound, in a leading New York case, held that the fact that a publisher of libelous matter has no actual intention to defame a particular man, or to injure any one, does not prevent recovery of compensatory damages. *Corrigan v. Bobbs-Merrill Co.,* 228 N. Y. 58, 10 A. L. R. 662. See *Cassidy v. Daily Mirror Newspapers,* 2 L. R. K. B. (Eng.) 331, 69 A. L. R. 720.

As Lord Chief Justice Coleridge said in *Gibson v. Evans,* 23 Q. B. 384, it does not signify what the writer meant; the question is, whether the alleged libel was so published by the defendant that the world would apply it to the plaintiff.

An instruction in an action for libel that if, in a circular charging stealing, plaintiff's name "R. Laudati" was used instead of "N. Laudati" as the result of negligence merely, and not intentionally, plaintiff could not recover, was error, as defendant was liable if the accusation in effect applied to plaintiff, regardless of whom it was aimed at. *Laudati v. Stea,* 44 R. I. 303, 26 A. L. R. 450.

A newspaper item reporting arrest of "Harry Kennedy,

an attorney, 40 years old," for forgery, held libelous as to "Harry F. Kennedy," the only lawyer by that name in the district, and about 37 years of age, where the person in fact arrested was "Harry P. L. Kennedy," and from Detroit, though publisher intended to refer to "Harry P. L. Kennedy." *Washington Post Co. v. Kennedy*, 55 App. D. C. 162, 3 Fed. (2d) 207, 41 A. L. R. 483.

3. Having reached the conclusion that the appellee is answerable for the publication in spite of the mistake, we will ascertain whether this article, published, as all agree, without any malice, can support a judgment for damages in favor of the appellant.

A publication is libelous *per se* which charges another with the commission of a criminal offense involving moral turpitude. *Pokrok Zapadu Publishing Co. v. Zizkovsky*, 42 Neb. 64.

It is contended by appellant that holding an unlicensed wrestling match, at which an admission is charged, or at which a prize or purse is given, is forbidden in this state, and is a crime. Comp. St. 1929, sec. 71-3101. While section 71-3103 provides that no private individual may receive a license therefor, yet it is a question whether it would be a violation of this statute to hold such a match where no part of the receipts were paid to any person except to the actual contenders and the officials.

In one of the earliest cases in the United States involving a charge of chastity, it was held: "In case the charge, if true, will subject the party charged to an indictment for crime involving moral turpitude, * * * then the words will be in themselves actionable." *Brooker v. Coffin*, 5 Johns. (N. Y.) 188, 4 Am. Dec. 337. In discussing this case, the Iowa court held that to charge drunkenness was not slanderous *per se*. *Amick v. Montross*, 206 Ia. 51. See notes in 58 A. L. R. 1147, 1159, and 1162.

The published article did not charge that Thomas Walker promoted the match, or that he was present, nor even did it charge that he had knowledge of it, nor is it settled that the event was held in violation of law. Therefore, the

allegation that the article charged a criminal offense against Walker, involving moral turpitude, is not sustained.

4. It is contended that the trial court erred in holding that the publication did not constitute libel *per se*. We have the advantage of having the memorandum opinion of the trial judge set out in full in the transcript. He compares the charge of being a thief, as set out in the majority opinion in *Iden v. Evans Model Laundry*, 121 Neb. 184, with the case at bar, and says: "There is nothing inherently wrong in holding a wrestling bout upon a farm, or nothing that would bring a person into public ridicule or contempt. * * * There isn't a person that knows Tom Walker that would believe anything wrong of him because of the publication of this article, or give it more than a passing thought and that of a humorous character. We think it comes within the rule laid down in *Lamberti v. Sun Printing & Publishing Ass'n*, 111 App. Div. (N. Y.) 437."

This case last referred to by the district judge involved a bit of horse-play, in which a diagram of a black hand in burnt cork was surreptitiously placed upon the back of Janitor Lamberti in the basement of the courthouse, in which he worked. His suit for libel against the New York Sun was based upon their publishing, with embellishments, his horror at the discovery of the ill-fated mark, in these words: "There must be a curse on me, a curse on me, I swear that mark was not there this morning. * * * Remove it from me, even if you have to cut off my flesh." Holding that the publication was not libelous *per se*, the New York court said that an actionable libel cannot be created out of nothing.

It is insisted that any publication injurious to the character of another is libelous *per se*, citing *Williams v. Fuller*, 68 Neb. 354. But in that case a judgment was affirmed in which the Riverton Review directly libeled its new town marshal by calling him "a pot-bellied, beer-guzzling old specimen of a degenerated race," which shows at once it is not in point in the case at bar.

In the case at bar, it is charged that the article blackens Tom Walker's character and tends to expose him to public ridicule, but in *Davis v. Meyer*, 115 Neb. 251, it was held that charging a woman with being "a half-breed Mexican" is not such a charge as subjects a person to public ridicule, ignominy or disgrace. This court is unable to agree with appellant that an article saying that two boys had a wrestling match in one's barn is sufficient to bring it within the law relating to public ridicule and defaming character. *Foster-Milburn Co. v. Chinn*, 134 Ky. 424; *Bigley v. National Fidelity & Casualty Co.*, 94 Neb. 813; *Williams v. Fuller*, 68 Neb. 354.

Words are libelous *per se* when they charge an offense which blackens one's character and exposes him to public ridicule, but the evidence in this case fails to sustain such a charge.

There being no error in the record, the judgment of the district court is

AFFIRMED.

WARREN SHAMBURG, APPELLEE, V. ANNA MATHIESEN ET AL., APPELLEES: OSCAR LUNDBORG, APPELLANT.

FILED FEBRUARY 10, 1932. No. 28087.

1. Parol Evidence: ASSUMPTION OF MORTGAGE. "The grantee in a deed containing a clause that the grantee assumes and agrees to pay certain mortgages on the land is ordinarily not estopped from denying such recital, and may show by parol evidence that, in fact, he never made such an agreement." *Peters Trust Co. v. Miskimins*, 115 Neb. 88.
2. Evidence examined, and *held* to support the decree of the trial court.

APPEAL from the district court for Cheyenne county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Paul L. Martin, Herman Ginsburg and *Joseph Ginsburg*, for appellant.

G. P. Kratz, R. P. Kepler and *E. L. Hyde, contra.*

Heard before GOSS, C. J., EBERLY and PAINE, JJ., and BEGLEY and ELDRED, District Judges.

BEGLEY, District Judge.

Action brought by appellee Shamburg to foreclose a mortgage on certain real estate in Cheyenne county, Nebraska, which plaintiff alleged to be a first mortgage. Plaintiff joined appellant Lundborg as a party defendant, alleging that appellant's mortgage had been paid, and was barred by the statute of limitations. Appellant Lundborg filed a cross-petition setting up his mortgage as a first lien and asking foreclosure thereof. Lundborg admitted that his mortgage was executed and delivered October 30, 1916, due three years after date, and that no payments had been made thereon, but alleged that in a deed from one Sandahl to Andrew Mathiesen, dated May 27, 1922, the grantee assumed and agreed to pay said mortgage, and the statute of limitations only began to run from said date. Plaintiff and the owners of the equity of redemption in this property joined in asserting that appellant's mortgage was of no validity, and was barred by the statute of limitations, and prayed the court to reform the deed of Mathiesen by striking out the assumption clause, which they claimed was inadvertently and by mistake of the scrivener placed therein. The trial court found for the appellee, granted the reformation prayed for, and held that his mortgage constituted a first lien and ordered a foreclosure thereof, and dismissed appellant's cross-petition. The appellant has appealed.

The evidence discloses that on October 30, 1916, D. R. Jones and wife mortgaged the land involved herein which they had recently purchased to the defendant and appellant, Oscar Lundborg, which mortgage was duly filed for record. This mortgage to Lundborg was for $4,000 and was made payable on October 30, 1919, three years after the date of its execution. On the date the mortgage was made, Jones sold the property to Joseph M. Swenson, the deed having a clause whereby the grantee assumed and agreed to pay the Lundborg mortgage. On February 23, 1917, Swenson

conveyed the premises to Frank Vrtatka, in which deed there was also a clause providing that the grantee assumed and agreed to pay the Lundborg mortgage. Vrtatka at this time executed a mortgage to W. P. Miles for $1,600, which mortgage was immediately assigned to Joseph M. Swenson and duly released on June 19, 1923. On February 18, 1918, Vrtatka conveyed the property to Carl F. Sandahl, one of the defendants in this case. The deed of conveyance to Sandahl recited that the land was free from incumbrance, except a mortgage of $5,600 now on the above described land. On March 1, 1918, Sandahl executed a mortgage to Bentley and Fishman for $4,000. On May 27, 1922, Sandahl conveyed the property to Andrew Mathiesen. The named consideration in the deed of conveyance from Sandahl to Mathiesen is $17,600. The deed contained the following clause: "Subject to two mortgages of $4,000 each and one mortgage of $1,600, which grantee assumes." It is this clause that is in controversy in this case. No part of the principal or interest has been paid on the Lundborg mortgage, and without this clause his lien is barred by the statute of limitations. The appellees introduced evidence in the lower court for the purpose of having this clause disregarded or eliminated, on the theory that it was not a part of the contract between Sandahl and Mathiesen, that it was placed in the deed by mistake of the scrivener without knowledge of its presence there or of its significance on the part of the parties to the deed, without consideration or justification, and that it should in no way benefit the defendant Lundborg. Subsequent to this deed Mathiesen on the 1st day of March, 1923, mortgaged the property to the appellee Shamburg for $2,000. Andrew Mathiesen died sometime prior to August 23, 1928. His interest in the premises passed to his heirs. The Shamburg mortgage was due March 1, 1928, and the interest was paid to March 1, 1929. This action was commenced March 18, 1930.

One Charles S. Beebe was the scrivener who drew up the deed between Sandahl and Mathiesen. He was a former

treasurer of Wayne county and a former president of a bank in Wakefield, Nebraska. He testified that on May 27, 1922, at the time when the deed from Sandahl to Mathiesen was executed, he resided in Wakefield, Nebraska; that he knew both parties and was acquainted with their business affairs intimately; that they were customers of his bank; that they talked to him regarding it and that he knew the details of the transaction; that about the time the above mentioned deed from Sandahl to Mathiesen was made, Sandahl was indebted to a bank at Wayne; that Mathiesen had guaranteed the payment of said debt, which was around $5,000 and in consideration of such guarantee of payment Sandahl deeded the land involved herein to Mathiesen; that at the request of the parties he drew up an agreement in writing between said parties whereby if there was any equity in the land when it could be sold or might be sold, this equity was to revert to Mr. Sandahl; that the deed was signed in his office and delivered to Mathiesen; that it took Mathiesen some time to make arrangements to get the cash for Sandahl's debts and that he let Mathiesen have some of it; that he inserted the clause, "subject to two mortgages of $4,000 each and one mortgage of $1,600, which grantee assumes;" that he had no instructions to put the same in the deed and that he made same in accordance with his usual custom and from the entries on the abstract; that he just did that on his own understanding of what should be done in that kind of cases; that he did not know the real meaning of the terms nor did either of the parties to the transaction; that Sandahl always contended there was one mortgage that was paid, which was the Lundborg mortgage. No discussion was ever had that he recalled about Mathiesen having assumed the payment of the two $4,000 mortgages.

Mr. Sandahl testified that he was present when the deed was drawn by Beebe; that he did not know the clause, "subject to two mortgages of $4,000 each and one mortgage of $1,600, which grantee assumes," was in the deed; that the land was deeded to Mathiesen as security for two notes

owed by Sandahl to the Bank of Wayne, which Mathiesen paid prior to the execution of the deed; that no other money was paid for the land; that there was no agreement of any kind between him and Mathiesen that Mathiesen would pay the Lundborg mortgage; that Beebe was his banker and he relied upon him to draw the deed; that there was a written agreement between him and Mathiesen whereby he, Sandahl, was to have the land back under certain circumstances, Mathiesen only holding same as security, but he has never redeemed it; that Lundborg never made demand for payment of his mortgage, nor was he able to locate Lundborg, and he thought his mortgage had been paid.

Appellant contends that the evidence is insufficient to justify the court in granting reformation. We do not deem it essential that reformation be had by the court. In the case of *Crane v. Leclere,* 206 Ia. 1270, it is held that the real assumption contract between the grantor and grantee may be shown by oral evidence, and as between the assuming grantee and the mortgagee, reformation of contract is not essential to the defense, where oral evidence contradicts the writing. In the case of *Peters Trust Co. v. Miskimins,* 115 Neb. 88, the court held: "The grantee in a deed containing a clause that the grantee assumes and agrees to pay certain mortgages on the land is ordinarily not estopped from denying such recital, and may show by parol evidence that, in fact, he never made such an agreement."

The evidence in this case shows that the assumption clause in the deed was placed there by the mistake of the scrivener and without the knowledge or consent of the parties to said deed; that it was no part of the consideration for said deed and is not binding upon the parties thereto. The court properly struck the same from the deed and held that the mortgage of the appellant Lundborg was barred by the statute of limitations.

The decree of the district court is therefore

AFFIRMED.

NEBRASKA STATE BANK OF VALPARAISO, APPELLEE, V. CITIZENS STATE BANK OF THEDFORD ET AL., APPELLANTS.

FILED FEBRUARY 10, 1932. No. 27609.

1. **Abatement**: SPECIAL APPEARANCE. "If the lack of jurisdiction over the person of the defendant does or does not appear on the face of the record, it may be raised by special appearance, and error, if any, committed in the overruling thereof is not waived by answering over, where the objection is pleaded in the answer." *Gaines v. Warrick*, 113 Neb. 235.
2. **Appearance**: JURISDICTION: WAIVER. "An objection to the jurisdiction of the court over the person of the defendant is waived by joining with it an objection to the jurisdiction over the subject-matter." *Bodge v. Skinner Packing Co.*, 115 Neb. 41.
3. **Bankruptcy**: DISCHARGE: LIABILITY FOR CONVERSION. The supreme court of the United States has held that a discharge in bankruptcy, under the federal bankruptcy laws, does not release the bankrupt from liability to respond in damages, to the person entitled thereto, for a wrongful conversion of personal property of another by the bankrupt prior to such discharge. And this court is bound by the construction of the federal bankruptcy laws adopted by the supreme court of the United States.
4. **Conspiracy**: EVIDENCE: ADMISSIBILITY. It is only those acts and declarations of a conspirator which are done and made while the conspiracy is pending and in furtherance of its object that are admissible in evidence against his associates. After the conspiracy has come to an end, the subsequent declarations and admissions of one conspirator, by way of narrative of past events, are not admissible in evidence against others.
5. **Evidence** examined, and *held* not to sustain the verdict and judgment.

APPEAL from the district court for Furnas county: CHARLES E. ELDRED, JUDGE. *Reversed.*

I. D. Evans, Squires, Johnson & Johnson, Stevens & Stevens and *H. N. Mattley*, for appellants.

George I. Craven and *Joe F. Berggren, contra.*

Heard before ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ., and HORTH, District Judge.

HORTH, District Judge.

The plaintiff, appellee herein, commenced this action in the district court for Furnas county, Nebraska, seeking to recover from the defendants, Otto J. May, a resident of Furnas county, Nebraska, Citizens State Bank of Thedford, Nebraska, and J. H. Figard, a resident of Thomas county, Nebraska, appellants herein, the value of nineteen registered white face cattle, upon which plaintiff claimed a mortgage lien under a mortgage, or mortgages, given by the defendant Otto J. May, then a resident of Lancaster county, Nebraska, to the Farmers State Bank of Agnew, Nebraska, and by it assigned to the plaintiff, and which cattle plaintiff charges the defendant Citizens State Bank unlawfully converted to its own use, and that the other defendants conspired with said Citizens State Bank in bringing about such conversion.

A trial was had to the court and a jury resulting in a verdict and judgment in favor of the plaintiff, from which the defendants appeal, setting forth numerous assignments of error, including those herein discussed. Any assignments of error not discussed are either not well taken, or, if well taken, their determination has become unnecessary by reason of the conclusions here reached.

The transcript discloses that the defendant Otto J. May was served with summons in Furnas county, Nebraska, and the defendants Citizens State Bank and J. H. Figard were served with summons in Thomas county, Nebraska. The defendants Citizens State Bank and J. H. Figard joined in filing a special appearance objecting to the jurisdiction of the court over their persons for the reason that they were both residents of Thomas county, Nebraska, and that their codefendant, Otto J. May, was a resident of Furnas county, Nebraska, and that no issuable controversy existed between the plaintiff and the defendant May, and that said Otto J. May was not a necessary or proper party to this action and was named as such for the sole purpose of obtaining service upon the defendants Citizens State Bank and J. H. Figard; and to such special appearance is at-

tached certain exhibits disclosing that said defendant Otto J. May had been discharged in bankruptcy from the indebtedness for which the mortgages covering the cattle claimed to have been unlawfully converted by the defendants were given to secure. The special appearance was overruled. Thereupon the defendant Citizens State Bank interposed a general demurrer to plaintiff's petition, and, this being overruled, filed its answer, in effect a general denial of the allegations of plaintiff's petition, coupled with an endeavor to preserve its rights under its special appearance, and in so doing used the following language:

"Not waiving its special appearance heretofore filed herein, but all the while insisting upon the same, and alleging that this Honorable Court has no jurisdiction over the person of this answering defendant, *or the subject-matter of this action.*"

The answer of the defendant J. H. Figard denies the allegations of plaintiff's petition and pleads the statute of limitations. This answer makes no mention of the special appearance in which he joined. The answer of the defendant Otto J. May is a general denial of the allegations of plaintiff's petition, and a plea of his discharge in bankruptcy.

1. The defendant, Citizens State Bank assigns as error the overruling of its special appearance.

By the pronouncement in *Gaines v. Warrick*, 113 Neb. 235, this court is committed to the doctrine that "If the lack of jurisdiction over the person of the defendant does or does not appear on the face of the record, it may be raised by special appearance, and error, if any, committed in overruling thereof is not waived by answering over, *where the objection is pleaded in the answer.* All holdings of this court to the contrary overruled."

In *Perrine v. Knights Templar's and Masons' Life Indemnity Co.*, 71 Neb. 273, it is said: "An appearance for the purpose of objecting to the jurisdiction of the court of the subject-matter of the action, whether by motion or formal pleading, is a waiver of all objections to the juris-

diction of the court over the person of the defendant, whether the defendant intended such waiver or not."

And in *Bodge v. Skinner Packing Co.*, 115 Neb. 41, it is said: "An objection to the jurisdiction of the court over the person of the defendant is waived by joining with it an objection to the jurisdiction over the subject-matter."

The present action is a transitory one, and the district court for Furnas county had jurisdiction of the subject-matter, and the defendant Citizens State Bank, having, in its answer, joined with its plea to the jurisdiction of the court over its person an objection to the jurisdiction of the court over the subject-matter of the action, thereby waived all rights under its special appearance.

2. The defendant Citizens State Bank complains of the overruling of its demurrer to plaintiff's petition, and all the defendants urge that the trial court erred in permitting plaintiff to amend its petition. The petition states a cause of action and the demurrer was rightfully overruled. The amendment to the petition did not change the issues, and there was no abuse of discretion on the part of the trial court in allowing the amendment.

3. The plea contained in the answer of the defendant Otto J. May, that prior to the commencement of the present action plaintiff had recovered a judgment against the defendant Otto J. May in the district court for Lancaster county, Nebraska, upon the promissory notes mentioned and referred to in the sixth paragraph of plaintiff's petition, and that said judgment had been satisfied and released by his discharge in bankruptcy, under an order duly entered in the district court of the United States for the district of Nebraska, states no defense to the cause of action set forth in plaintiff's petition. The judgment, satisfied by defendant May's discharge in bankruptcy, was founded upon the promissory notes, while the present action is one to recover damages for the alleged unlawful conversion of the chattels pledged, by way of mortgage, to secure the payment of such notes, and, notwithstanding the recovery of a judgment upon the promissory notes and

its subsequent release by the defendant May's discharge in bankruptcy, plaintiff is still entitled, as against the defendant May, to the benefit of the property pledged as security for the payment of the notes. In an action to recover damages for the unlawful conversion of bonds, pledged as security for the payment of a debt, and wherein the defendant pleaded his discharge in bankruptcy as a defense, the supreme court of the United States, in *McIntyre v. Kavanaugh*, 242 U. S. 138, said:

" 'A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another.' * * * A wilful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done wilfully and maliciously, so as to come within the exception. * * * The circumstances disclosed suffice to show a wilful and malicious injury to property for which plaintiff in error became and remains liable to respond in damages."

The supreme court of Nebraska is bound by the construction of the federal bankruptcy laws adopted by the supreme court of the United States.

4. For the purpose of establishing the conspiracy charged in plaintiff's petition, and over the objections of the defendants Citizens State Bank of Thedford and J. H. Figard, plaintiff was permitted to introduce in evidence a large number of questions propounded to the defendant Otto J. May, and his answers made thereto on the 24th and 25th days of January, 1927, as a witness in an action pending in the district court for Lancaster county, Nebraska, which answers contained statements, declarations and admissions prejudicial to the defendants Citizens State Bank of Thedford and J. H. Figard. These questions and answers are too numerous to be set out in full in this opinion; but, for illustration, a few of the questions, the

objections interposed thereto upon the trial of this case, the rulings of the court thereon, and the answers of the witness, follow:

"By Mr. Craven: (Reading from exhibit No. 43) * * * 'In other words, that bill of sale did not mean anything, did it?'

"By Mr. Stevens: Objected to as calling for a conclusion.

"By the Court: Overruled. Defendants except.

"By Mr. Craven: (Reading from exhibit No. 43) A. 'It did not mean a thing; no, sir.' Q. 'It was to cover up?' A. 'It was to cover a deficiency judgment that Mr. Bivens got against me on the ranch.' Q. 'And the Citizens State Bank at Thedford knew that the bill of sale was a cover-up, didn't they?'

"By Mr. Stevens: Objected to as calling for a conclusion and not the best evidence.

"By the Court: Overruled. Defendants except.

"By Mr. Evans: And not a statement of facts.

"By the Court: Overruled. Defendants except.

"By Mr. Craven: (Reading from exhibit No. 43) A. 'Yes, sir; absolutely.'"

In *Farley v. Peebles,* 50 Neb. 723, Mr. Irvine, Commissioner, in writing the opinion, said:

"What is merely narrative of a past occurrence, or what is merely expressive of a future purpose, would not generally be so admissible; but an act performed, a declaration made, a writing made or delivered, as a part of the matter in dispute, that is, in itself tending to advance the common purpose or object of the alleged conspiracy, is neither hearsay nor merely the admission of one of the parties. It is an overt act in pursuance of the object. From such overt acts of each of the alleged conspirators the jury may, together with other evidence, infer the existence of the conspiracy itself. We are aware that it is the established rule that the acts or declarations of one of the alleged conspirators are not admissible as against the others unless the conspiracy itself be established, in which

case the act or declaration of one becomes that of all; and we are aware, also, that it has sometimes been stated that such acts or declarations are not admissible in evidence until the conspiracy itself is first *prima facie* established."

In *Zediker v. State*, 114 Neb. 292, it is held:

"Wherever the writings or words of any of the parties charged with, or implicated in, a conspiracy can be considered in the nature of an act done in furtherance of the common design, they are admissible, not only against the party himself, but against all of his coconspirators, whether present or not. Wherever the writings or words of such party amount to an admission merely of his own guilt, and cannot be deemed acts done in furtherance of the common design, they can be received in evidence only against the party making or uttering them. Held, under the facts as reflected by the record in the case, statements set forth in this opinion, testified to over objection, were the recital or narration of a past transaction merely, and were not made in furtherance of the common design."

In the body of the opinion, Justice Eberly says:

"On this subject the supreme court of the United States has laid down the following rule: 'Doubtless, in all cases of conspiracy, the act of one conspirator in the prosecution of the enterprise is considered the act of all, and is evidence against all. *United States v. Gooding*, 25 U. S. 460, 469. But only those acts and declarations are admissible, under this rule, which are done and made while the conspiracy is pending, and in furtherance of its object. After the conspiracy has come to an end, whether by success or failure, the admissions of one conspirator, by way of narrative of past facts, are not admissible in evidence against others.' *Logan v. United States*, 144 U. S. 263, 308. * * * It follows that the conversation set forth herein was a mere narration of a past event, and not forming a part of, or connected with, anything then being done in furtherance of the object of the conspiracy. It is incompetent as against the defendant who was not present, and its introduction constitutes reversible error."

The statements, declarations and admissions made by the defendant Otto J. May, while testifying as a witness in the case in Lancaster county, more than fifteen months after the unlawful conversion is alleged to have taken place, were mere narrations of past events and did not form a part of anything then being done in furtherance of the alleged conspiracy, and were incompetent evidence against the defendants Citizens State Bank and J. H. Figard, and their admission in evidence is reversible error. And again adverting to questions No. 622 and No. 624, above quoted, both call for conclusions of the witness, and the answers were mere conclusions, and were prejudicial to the rights of the defendants Citizens State Bank and J. H. Figard, as tending to mislead the jury, and for this reason, also, their admission in evidence is reversible error.

5. Complaint is made that the court erred in submitting to the jury the question of damages for conversion, when no sufficient identification of the chattels alleged to have been converted had been established.

Concerning the cattle, claimed by plaintiff to have been wrongfully converted by the defendants, the second paragraph of plaintiff's petition, in substance, alleges that, on or about the 14th day of March, 1922, the defendant Otto J. May executed and delivered to Farmers State Bank of Agnew, Nebraska, his promissory note for $2,000, and as security therefor executed and delivered to said Farmers State Bank a chattel mortgage covering the following described property: Four registered white face cows, about 4 years old; 5 registered white face cows, about 8 years old; 9 registered white face calves, about 1 year old; and 1 registered white face bull, 5 years old. The mortgage here referred to was not received in evidence and, its existence being denied by the defendants Citizens State Bank and J. H. Figard, there is nothing in the record, so far as they are concerned, showing the plaintiff ever had a chattel mortgage upon the 19 registered white face cattle alleged to have been wrongfully converted by defendants.

The description of the cattle, incumbered by the two

mortgages of later date, mentioned in the third and fourth paragraphs of plaintiff's petition and introduced in evidence upon the trial as plaintiff's exhibits 19 and 20 are of no assistance in identifying the 19 registered white face cattle with the conversion of which the defendants are charged. The former, exhibit 19, describes the cattle therein mortgaged as follows: Five calves about 5 months old, red, weight 450 pounds; 5 heifers, about 1 year old, red, weight about 900 pounds; 3 bulls, about 1 year old, red, weight about 900 pounds; 2 heifers, about 2 years old, red, weight about 1,100 pounds; 9 cows, 6 to 10 years old, red, weight about 1,400 pounds; and 1 bull, about 5 years old, red, weight about 1,700 pounds; and the latter, exhibit 20, describes the cattle therein mortgaged as follows: Eight cows, 7 to 12 years old, spotted, weight 1,400 pounds each; 2 cows, 4 years old, spotted, weight 1,100 pounds; 5 cows, age 3 years, spotted, weight 900 pounds; 2 heifers, 1 year old, spotted, weight 500 pounds; 2 bulls, 1 year old, weight 500 pounds; one bull, 8 years old, weight 1,600 pounds; 5 heifers coming yearlings and 3 bulls coming yearlings. There is nothing in these two mortgages that would enable a third person, aided by inquiries which the mortgages themselves suggest, to identify the cattle therein described as being the 19 registered white face cattle for the conversion of which plaintiff here seeks a recovery. This conclusion, together with the finding that the testimony of the defendant May, given upon the trial of the case in Lancaster county and introduced in evidence upon the trial of this case, is incompetent as against the defendants Citizens State Bank and J. H. Figard, leaves the record barren of any competent evidence identifying the cattle alleged to have been converted, or connecting the defendants Citizens State Bank and J. H. Figard, or either of them, with their conversion, or establishing the conspiracy charged in plaintiff's petition.

For the errors herein mentioned, the judgment of the district court must be reversed as to all the defendants, and in so doing we are not unmindful of the rule of law

that, where several defendants are proceeded against as conspirators in the commission of a tort, which would be actionable if committed by one alone, the damage done and not the wrongful confederation is the gist of the action, and a judgment against one or more of the defendants may be sustained without proof of the conspiracy. With all of his statements and admissions construed most strongly against him, the evidence does not connect the defendant May with the conversion alleged in plaintiff's petition.

REVERSED AND REMANDED.

IN RE ESTATE OF JOHN BACKES.
ETTA BRUMMETT, APPELLEE, V. JOHN W. BACKES ET AL., ADMINISTRATORS, APPELLANTS.

FILED FEBRUARY 10, 1932. No. 28025.

1. **Bills and Notes.** The instrument set forth in appellee's petition *held* to be a promissory note evidencing a present and existing indebtedness at the time of its execution and delivery.
2. ———: TIME OF PAYMENT. Where a promissory note provides for its payment when the maker sells a specified tract of land, the note will become due and payable after lapse of a reasonable time in which to make such sale. Six years is more than such reasonable time.
3. **Evidence** examined and *held* to sustain the findings and decree of the trial court.

APPEAL from the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Schaper & Runyan, for appellants.

Sullivan & Wilson, contra.

Heard before ROSE, GOOD and DAY, JJ., and FROST and MESSMORE, District Judges.

MESSMORE, District Judge.

Appellee, claimant below, brought suit on a promissory note in the district court for Custer county. The case was

tried to the court, which found for appellee in the sum of $899, with interest at 7 per cent. and costs of action.

Appellee's petition alleges the promissory note, the subject-matter of this action, as follows:

"Arnold, Nebr., January 11, 1924.

"Upon the date of sale or transfer by me of the east one-half of the southeast quarter of section 34, town 17, range 25, after date, we promise to pay to the order of Etta Backes, eight hundred forty-two and 50/100 dollars at Arnold, Nebraska, with interest at the rate of 1/10 of 1 per cent. per annum, payable annually from date until due.

"Should any of the principal or interest not be paid when due, it shall bear interest at the rate of 7 per cent. per annum, payable annually, until paid. The makers, sureties and indorsers hereof waive demand, notice and protest and agree to any extension of time of payment.

"John Backes."

Appellants' answer is to the effect that no debt existed; that there was no consideration for the note; that the land in question, which was deeded back to John Backes, the maker of the note, had decreased in value; and the right of redemption applied to the holder of this note and that the same was not redeemed. The reply was a general denial.

The evidence discloses that appellee and her former husband, Andrew Backes, by their joint efforts had accumulated different properties and that the moneys of both of them went into the purchase of said properties; that the last property purchased by them was from John Backes, now deceased, the father of Andrew Backes, for the sum of $6,000, on which $2,000 had been paid by grantees; that there had been trouble between Andrew Backes and his wife, appellee; that they were contemplating a divorce and had agreed to divide the property; that appellee desired that the said John Backes take back this land. Several conversations in reference to the manner of taking the land back were offered for the record. The net result of the

negotiations was that John Backes gave the note hereinbefore set out. The conversations with reference to the execution of the note and pertinent to the case were properly admitted by the trial judge.

The principal assignment of error which will be discussed in this opinion, holding the other assignments of error to be without merit, is that the court interpreted the instrument sued on as representing a present and existing indebtedness at the time of its execution, rather than an indebtedness to arise only upon the performance of a condition which was never performed.

John Backes executed the note on January 11, 1924. He died intestate June 9, 1930. The note was filed as a claim against his estate. The contention of appellee is that the note was a debt at the time of its execution and that a reasonable length of time had expired and that the claim therefore is a just claim as against the estate of deceased. The question is whether John Backes should sell or transfer the land as a condition to be complied with before the note could be considered valid.

Appellants contend that the contract should be construed in the light of surrounding circumstances and the condition of the parties at the time it was made. *Singer Mfg. Co. v. Doggett,* 16 Neb. 609; *Nebraska Hardware Co. v. Humphrey Hardware Co.,* 81 Neb. 693; *Frerking v. Thomas,* 64 Neb. 193.

In *Nebraska Hardware Co. v. Humphrey Hardware Co., supra,* it was held: "In interpreting a written contract, the meaning of which is in doubt or dispute, the court, in order to determine its meaning, will consider all the facts and circumstances leading up to and attending its execution, and will consider the relations of the parties, the nature and situation of the subject-matter, and the apparent purpose of making the contract. The court will, so far as possible, put itself in the place of the parties and interpret the contract in the light of the circumstances surrounding them at the time it was made and the object which they had in view."

In *Frerking v. Thomas, supra,* it was held: "In reviewing a cause on appeal, where the findings and decree of the trial court cannot be reconciled with any reasonable construction of the testimony, the same will be set aside as unsupported by sufficient evidence."

At the time of the death of John Backes he had the land, and in addition thereto had the sum of $1,685, after deducting $315 for interest and taxes, which represented the amount he had been paid by appellee and her husband. As evidence of this indebtedness appellee had the instrument in question. This instrument is one which is conditional on its face, the condition being that "upon the date of sale or transfer by me (meaning John Backes)" of the land described in the note, "after date," then a promise to pay to the order of Etta Backes, now appellee in this case, "eight hundred forty-two and 50/100 dollars * * * with interest at the rate of 1/10 of 1 per cent. per annum, payable annually from date until due. Should any of the principal or interest not be paid when due, it shall bear interest at the rate of 7 per cent. per annum, payable annually, until paid." Then there are indorsements of interest on the instrument as follows: "Paid Jan. 12, 1926 Int. to date $1.68. Pd. 4-28-27 Int. to 1-11-27 .84." The execution of the instrument is not attacked and no dispute can arise between the parties in that behalf. The circumstances which led up to the making of the instrument constitute evidence for its consideration.

In construing an instrument of this nature it cannot be contemplated upon a condition that might run for an indefinite period of time. Equity and good conscience would demand a construction of it to run for a reasonable length of time.

In *Crooker v. Holmes,* 65 Me. 195, 20 Am. Rep. 687, a promissory note was made payable "when I sell my place where I now live." Held, that the maker was bound to sell his place within a reasonable time and, failing in that, the note was due. In this case Appleton, Judge, states: "It is claimed that the debt will never become payable,

and can never be enforced. The maker of the note promises to pay when he shall sell the place he lives on in Oxford, Maine. The debt is due *in præsenti.* Its payment is postponed to a future time, but the debt none the less exists. The debt is absolute, the time of its payment indefinite."

In *De Wolfe v. French,* 51 Me. 420, the court decided that, where a debt is due absolutely and the happening of a future event is fixed upon as a convenient time for its payment merely, and the future event does not happen as contemplated, the law implies a promise to pay within a reasonable time.

In *Hicks v. Shouse,* 17 B. Monroe (Ky.) 483, it was held that, where an obligation was to pay $500 "so soon as I sell my house and lot in the city of Lexington, and until said sale is made, I promise to pay 8 per cent. interest on said sum," said sum was due in a reasonable time, and seven years, which was the time that had elapsed before suit, was long enough for payee to wait.

In *Smithers v. Junker,* 7 L. R. A. 264 (41 Fed. 101) it was held: "A note for value received promising to pay a certain sum at the maker's convenience and upon this express condition that 'he is to be the sole judge of such convenient time of payment' may be enforced by an action after the expiration of a reasonable time on demand and refusal of payment. It does not give the maker the sole right to pay when it would suit his convenience to pay it."

In *Page v. Cook,* 41 N. E. 115 (164 Mass. 116) it was held: "Where a demand note is made payable when the payor and payee mutually agree, the payee may, if the payor refuse within a reasonable time to agree when the note shall be paid, demand payment, and, upon refusal, proceed to collect it."

In interpreting this contract, was it not the meaning that John Backes would sell this land within a reasonable time? Is not the conclusion irresistible that appellants knew appellee so understood the contract? The maker of the note, John Backes, had the land, had the money which

was paid to him by appellee and her husband, and when this instrument was made another just like it was made and handed to Andrew Backes. The instrument in question is nothing more or less than a promissory note which could be and was, in our opinion, understood by the parties. John Backes, now deceased, agreed to pay this money on the sale or transfer of the land, recognized it as a debt, agreed to pay interest on it, and did so. The note was a legal instrument. The provision in the note, "should any of the principal or interest not be paid," would then be a recognition by its maker that at some time the note would be due. The note begins, "upon the date of sale or transfer," indicating in itself an intention on the part of the maker to sell or transfer this land. The instrument is not ambiguous nor vague, and the record portrays nothing to show the right of redemption applies either to appellee or Andrew Backes, nor that this right expired at any time, nor that there was a date of maturity.

Appellee brought this action in the lower court after a period of six and a half years had expired between the date of the note and the date of the death of its maker. Such an action is not premature. In applying the decisions, we are convinced that a reasonable time for the sale of the land in payment of the debt, as existed under the circumstances of this case, would not extend beyond this period of time. Under the decisions obtainable, the character of the instrument and the transaction, it is clearly indicated to us that after a period of more than six years we can well apply the rule that a reasonable length of time within which to pay the note has been had by appellants.

We feel that justice has been done and that the decree of the district court should be, and is, hereby,

AFFIRMED.

CLARENCE G. BLISS, RECEIVER, APPELLANT, V. H. C. BACKEMEYER ET AL., APPELLEES.

FILED FEBRUARY 10, 1932. No. 28083.

1. **Bills and Notes:** COMPROMISE AND SETTLEMENT. Payment and acceptance of less than the full amount due on a note, though tendered as a settlement in full, does not bar recovery of the remainder, in the absence of a *bona fide* dispute over the amount claimed.
2. **Evidence** examined, and *held* not to support the verdict.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Reversed.*

George E. Hager, for appellant.

Burkett, Wilson, Brown, Wilson & Van Kirk and *W. A. Robertson, contra.*

Heard before ROSE, DEAN, GOOD and DAY, JJ., and THOMSEN, District Judge.

THOMSEN, District Judge.

This is an action upon a promissory note for $4,692.78 upon which the plaintiff alleges some payments and asks for a judgment for the remainder of $3,450. The note was executed by the appellees.

Two appellees, H. C. Backemeyer and T. V. McCartney, filed separate answers. The other appellee, H. S. Westbrook, did not appear and a default was entered against him. The answers of appellees Backemeyer and McCartney are substantially the same. In substance, they claim that the note in suit was a renewal of several predecessors, and that the original note was given for money borrowed of the Ashland State Bank by the Ashland-Wyoming Oil Company, a corporation, of which the appellees were directors; that the original note and the subsequent renewals were all executed by the appellees as directors of the corporation, and not for the purpose of binding themselves personally; that of this oil company, Walton, the cashier of the bank, was a stockholder, and that Walton represented to them that they were executing the several notes

in a proper manner to bind the corporation, and that they were not personally liable thereon; that later a controversy arose between Walton, the cashier, and appellees as to the liability on the note, and the controversy was settled by defendant McCartney paying $1,900 and defendants Backemeyer and Westbrook each paying $49, which sums were accepted in full settlement.

The reply admits that appellees were directors of the Ashland-Wyoming Oil Company, admits the payments made, and admits that Walton was at one time cashier of the Ashland State Bank, but denies all the other allegations.

In the course of the trial all evidence as to the relationship of appellees to the Ashland-Wyoming Oil Company, the capacity in which they claimed to have signed various notes, and that they were not to be personally bound, was excluded, and the court submitted the case to the jury on the issue as to whether or not there was a *bona fide* dispute as to liability, apparently as to other matters than the before-mentioned claims. The jury returned a verdict for the defendants.

Accepting the view most favorable to the appellees, the testimony shows that the exact amount due on the note was difficult of ascertainment, but the exact amount was not the source of any dispute upon which a settlement was based. It seems to be settled law that the payment of an amount less than that for which the debtor is liable does not constitute an accord and satisfaction unless a *bona fide* dispute or controversy as to the debtor's liability or as to the amount due from him arises. *Treat v. Price*, 47 Neb. 875; 3 Williston, Contracts, secs. 1851, *et seq.* We have searched the record in vain for testimony indicating a dispute which gave rise to the settlement. It seems clear that the appellees wanted to settle the note for less than the total amount due, and into whatever relationship they may have entered on behalf of the oil company the outcome may have merited an honest desire to escape liability. But the present testimony fails to show

any lawful means of escape. No useful purpose would be served in relating the evidence in detail. It would require a review of the whole record in this opinion, since the evidence fails to show that a dispute over the amount gave rise to a settlement, nor is the admitted evidence sufficient to raise a doubt of liability. The most that can be said is that, in proving the amount due, the plaintiff had difficulty in determining the exact amount, but no settlement was based upon any discussion as to a difference between the parties in the amount claimed by the plaintiff.

We were strongly tempted to enter upon a discussion of the admissibility in evidence of testimony tending to show the excluded facts alleged in the answer, upon which it is claimed the actual dispute arose and upon which the claimed settlement was made, the proposition resolving itself into whether such evidence, varying the terms of a written instrument, is admissible for the purpose of showing an accord and satisfaction in which the parties themselves recognize the possible invalidity of the note, and in which the facts, generally excluded from evidence to avoid a controversy over matters held in law self-evident, form the basis of a contract of settlement separate and distinct from the contract giving rise to the cause of action; but this question is not discussed in the briefs, nor in the nature of things is it before us on this appeal, and we therefore decline to pass on it. A new trial may result in having this issue adequately and thoroughly presented. Counsel so able as these will see that the proposition is exhaustively briefed.

In view of the fact that the evidence does not support the verdict, the judgment is reversed and the cause remanded.

REVERSED.

CARL PLOOG, APPELLANT, V. ROBERTS DAIRY COMPANY ET AL., APPELLEES.

FILED FEBRUARY 11, 1932. No. 28100.

Monopolies: ACTION FOR DAMAGES: PETITION: SUFFICIENCY. Petition for damages in restraint of trade under antitrust laws, sections 59-801, 59-803, 59-806, and 59-818, Comp. St. 1929, examined, and found vulnerable to demurrers.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Lawrence I. Shaw, for appellant.

J. W. Weingarten, contra.

Heard before GOSS, C. J., DEAN and PAINE, JJ., and CARTER and RHOADES, District Judges.

PER CURIAM.

This is an action at law, brought by the appellant to recover damages in the sum of $15,000 from the appellees, on account of alleged violations of the Nebraska antitrust law, as set out in sections 59-801 and 59-802, Comp. St. 1929, covering the subject of unfair local discrimination by any person, firm or company doing business in the state of Nebraska, and providing penalties for the violation thereof. Demurrers were filed to the original petition, and sustained, after which the appellant amended his petition, and the demurrers were allowed to stand by agreement as demurrers to the amended petition, and the demurrers being again sustained and the appellant electing to stand on the petition as amended, the action was dismissed by the district court.

The petition alleges, in substance, that the Roberts Dairy Company is a corporation, buying and selling fresh milk at Omaha; that the defendant, Floyd S. Pegler, is its manager at Omaha, and Lloyd Wright is the assistant manager, and that the defendants Chris Bull, Fred Glessman and John Harder are residents of Sarpy county, engaged in the same business, of trucking milk, as the appellant; that the appellant, a resident of Sarpy county, for two

years had been engaged in the business of hauling fresh milk with his truck equipment, in which he had invested some $2,000; that his customers consisted of some 19 farmer producers, located in the vicinity of Chalco, and that he hauled the milk of said customers daily to the Roberts Dairy Company in Omaha, Nebraska, and there the milk was purchased by the Roberts Dairy Company from the producers, for a price agreed upon between them; that the appellant was paid for hauling such milk by the farmers at a rate agreed upon, the amount of compensation varying in the case of each producer; that the said dairy company, with the other defendants, combined and conspired to restrict and restrain the trade and competition of the appellant and to drive him out of business, and to monopolize and control the daily hauling of fresh milk from the area from which the plaintiff had been hauling the same, and notified the farmers that, beginning within a day or two immediately following, the said dairy company would refuse to purchase or to accept fresh milk from them unless the same was transported by one of the defendants, Harder, Bull, or Glessman; that the three defendants, Wright, Bull, and Harder, notified the appellant that the said dairy company would no longer purchase fresh milk from the producers if the same was hauled or transported by the plaintiff. Appellant further alleged that, because of the distance hauled and the necessity for an immediate sale of fresh milk, it was impossible to make negotiations to sell the same to other persons without serious loss and damage to the producers, and that a majority of the producers acquiesced in the demands of the defendants and permitted said defendants to haul their milk, and therefore the plaintiff's business was absolutely destroyed; that appellant's average profits had been $160 a month, which were wholly cut off, and the value of his trucks greatly depreciated, all to his actual damage in the sum of $5,000, and appellant therefore prayed, as provided by law, that he be allowed to recover three-fold damages, in the sum of $15,000, and reasonable attorney's fees.

The appellees insist that contracts for the performance of service, without any definite or specific period of duration, are generally terminable at the will of either party (*Smith v. Bailey*, 105 Neb. 754) and that such antitrust laws should be reasonably interpreted and applied.

Appellees state that, as set out by Judge Sanborn in *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, such statutes cannot be taken too literally or it would defeat all competition, and insist that appellant has, during the period of two years, monopolized the business of hauling fresh milk from these customers by an arrangement and agreement or combination between himself and the farmer producers and the said dairy company, and admits that the said dairy company can only displace him by making another agreement between the producers and themselves with another milk hauler, and that the present arrangement is no different from the arrangement made with the appellant, and that obviously the appellant would not be entitled to employment as long as he lived, but that the producers and the dairy company would have a right to terminate at will the arrangement with him and make the same arrangement with another hauler.

It was held in *State v. Employers of Labor*, 102 Neb. 768, in the text of the opinion: "If there is no contract for any fixed term of employment, the employer may discharge, or the employee stop work, at his own pleasure."

In *Smith v. Bailey*, 105 Neb. 754, we find a rule stated by this court: "That contracts for the performance of services or for the continuous furnishing of commodities are, when the contract itself specifies no period of duration, terminable, upon reasonable notice, at the will of either party to the contract."

Judge Lacombe, of the circuit court of appeals, wrote the opinion in the case of *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46, in which case it was stated that the Cream of Wheat Company purchased in the open market a by-product in the manufacture of flour, and known as "purified middlings," which it put up in

packages and labeled "Cream of Wheat." This was its copyrighted trade-name, and by extensive advertising there was a large demand for the product. It sold this product only to wholesalers, with the one exception of selling to the Great Atlantic & Pacific Tea Company, plaintiff, which company had a large number of retail stores. When the Cream of Wheat Company decided to discontinue selling to the plaintiff, the court said: "There was no contract between the two which bound defendant to sell to complainant for any specified period of time. This suit is really brought to force defendant to continue to sell to this single retailer, as it sells to the wholesalers who trade with it." Because of the fact that the purchases of the Cream of Wheat Company of purified middlings only amounted to 1 per cent. of the total purchases of that commodity, the plaintiff did not prevail. Judge Lacombe further said: "We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern." And Judge Lacombe then quotes from Cooley on Torts, 278, this statement: "It is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice."

In the case on trial, we believe that the defendants acted within their legal rights, and while the notice given the plaintiff that they would discontinue business relations with him was exceedingly short, yet in the nature of the business it would be difficult to give a longer notice.

The aim of our antitrust laws is to preserve inviolate the principle of free, fair and open competition. At the same time, these laws seek to protect the consumer, so that he may purchase his commodity at competitive prices in a free and open market, and the courts seem to have taken the position that no person, firm or corporation may obstruct, impede or retard any one from carrying on a lawful business except by fair competition or persuasion, or by a peaceful severance of business relations.

We have examined the cases of *Cleland v. Anderson*, 66 Neb. 252, *Marsh-Burke Co. v. Yost*, 98 Neb. 523, and *State v. Interstate Power Co.*, 118 Neb. 756, and we find that the facts alleged in this case do not bring it within the holdings of those opinions. No error is found in the record of the district court in sustaining the demurrers to the amended petition, and its judgment is hereby

AFFIRMED.

ARTIE BOOTH V. STATE OF NEBRASKA.

FILED FEBRUARY 11, 1932. No. 28109.

ERROR to the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

Dale P. Stough, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., DEAN and PAINE, JJ., and CARTER and RHOADES, District Judges.

PER CURIAM.

Artie Booth was informed against in the district court for Richardson county and there charged with having maliciously and unlawfully caused to be destroyed by fire, on May 27, 1931, a barn then and there being the property of Lavina Michel. The jury found the defendant guilty as charged in the information. Thereafter the court upon inquiry, and pursuant to an admission made by the defendant in open court, found that he had previously been convicted and had served sentences for three other offenses. Thereupon the court, upon the verdict of guilt and "because of the defendant's prior convictions," sentenced him to the penitentiary for 10 years at hard labor. The defendant prosecutes error.

We do not find merit in the defendant's contention that, inasmuch as there is no allegation in the information that he was an habitual criminal, the sentence herein is void.

No such allegation was necessary. It was within the court's jurisdiction before imposing sentence to inquire of the defendant in respect of his past history, and, as noted above, the defendant admitted that he had previously been convicted of other criminal offenses. Under section 28-501, Comp. St. 1929, one convicted of arson may be sentenced to a term of from 1 to 20 years in the penitentiary. The defendant was found guilty of the crime of arson and the sentence imposed herein was punishment for such offense, with added severity because of prior convictions. Clearly, it was within the court's discretion to sentence the defendant to 10 years, in view of the conduct disclosed, and warranted by his past record. Prejudicial error does not appear in the sentence herein. The judgment is

AFFIRMED.

FIRST NATIONAL BANK OF OMAHA, APPELLANT, V. JOHN M. FLANNIGAN ET AL.: FIRST NATIONAL BANK OF NAPER ET AL., APPELLEES.

FILED FEBRUARY 11, 1932. No. 28124.

Evidence examined, and *held* to sustain the judgment of the trial court.

APPEAL from the district court for Boyd county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Finlayson, Burke & McKie and *J. A. Donohoe,* for appellant.

John A. Davies, contra.

Heard before ROSE, GOOD and EBERLY, JJ., and CARTER and CHASE, District Judges.

PER CURIAM.

This is a proceeding in equity in the district court for Boyd county, Nebraska, to impress a trust in favor of the First National Bank of Omaha, as plaintiff, upon certain property alleged to be in the possession of the defendants.

At the trial of the case, by agreement of all parties, it was stipulated (so far as the questions before us are concerned) "that the only issues to be tried and considered * * * were the issues between the plaintiff, the First National Bank of Omaha, Nebraska, and the defendant, Robinson, as receiver of the First National Bank of Naper, Nebraska, as to the ownership of said sum of $1,737 paid to the clerk of the district court of Boyd county" by the First National Bank of Butte, Nebraska, representing two checks aggregating $1,737, of which G. W. Short and Walter S. Peacock were the makers.

Upon the issues, thus limited, a trial on the merits resulted in a finding in favor of the First National Bank of Naper that "the money heretofore paid into court, to wit, the sum of $1,737, by Walter S. Peacock and G. W. Short was the property of the First National Bank of Naper," and a judgment in favor of the latter institution thereon. Thereupon, after motion for a new trial had been denied, the plaintiff bank appeals.

The controversy grows out of the following facts: On June 19, 1930, Bert Hoyt and Jesse Hoyt executed and delivered to John M. Flannigan their promissory note for $9,450, secured by a mortgage on 266 head of mixed cattle. The mortgage was properly filed. Before the maturity of the note it was sold and indorsed by the payee to the First National Bank of Omaha, which thereby became the *bona fide* holder thereof for value. The chattel mortgage was also assigned to this bank.

After maturity of this note, the Hoyts, on October 27, 1930, executed and delivered to E. F. Jepsen, an assistant cashier of the First National Bank of Omaha, a bill of sale of the mortgaged cattle, and also a written agreement which permitted the Hoyts to retain possession of the mortgaged cattle, and to sell the same at any time up to November 15, 1930, and to account for the proceeds of such cattle to the First National Bank of Omaha. This written agreement further provided: "In the event that the same are not so sold, prior to said date (November 15, 1930),

said parties of the first part (the Hoyts) agree to sell all of said cattle hereinabove described, and not sold as provided in paragraph 3 hereof, at public sale on November 15, 1930, the proceeds of such sale to be remitted to said E. F. Jepsen at once to be applied on the indebtedness of said parties of the first part to the First National Bank of Omaha up to the amount of said note.

"5. It is further agreed that, in the event said parties of the first part fail to sell said cattle as provided in paragraphs 3 and 4 hereof, then said parties of the first part agree to deliver said cattle so remaining unsold to said E. F. Jepsen either at the farm of said parties of the first part, or at Newport, at the option of said E. F. Jepsen."

Jepsen never made demand for possession of the cattle under the paragraph last above quoted. A sale of all the cattle was held at public vendue on the 17th of November. The reason given in the record for this extension of the time of the sale was that as November 15, 1930, was on Saturday, it was deemed "a poor sale day," and by mutual consent the sale was advertised for and held on Monday, November 17. This sale was evidently satisfactory to all parties. Appellant states in its brief: "As a matter of local convenience, and in order to prevent the impression that the sale was forced, the cattle were advertised in the handbills of the sale as the cattle of Bert Hoyt and Jesse Hoyt."

One of the sale bills in the record before us shows that John M. Flannigan and Fred A. Putnam were advertised as the clerks thereof, and all parties admit they acted as such. E. F. Jepsen, an assistant cashier of the Omaha bank, and its trustee under the bill of sale, one of the witnesses in this case, testified in reply to questions propounded by the trial court, on this subject, substantially as follows: That Flannigan represented him and his bank at this sale. That Putnam came to it at the request of John M. Flannigan. That Flannigan was his (Jepsen's) representative and his clerk, and "was really the clerk." That Jepsen did not know that Putnam was coming until he saw

the bills advertising the sale, and that he understood the latter was merely Flannigan's assistant and took his instructions from Flannigan, the chief clerk. The evidence, as an entirety, plainly discloses that Putnam had no contractual relations with either Jepsen or with his bank, and that his employment was as a mere assistant to Flannigan, and was thought desirable because of his more extended acquaintance with the inhabitants of the neighborhood wherein the sale was held. The sale, as already disclosed, took place on November 17, and Jepsen, representing himself and the bank, was present. All of the property was sold. Certain purchases required bills of sale executed by Jepsen for the Omaha bank, and these were furnished by Jepsen. The sheriff of the county collected some four hundred odd dollars in personal taxes of the Hoyts, the payment of which was authorized by Jepsen out of the proceeds of the sale. Jepsen also knew that the purchasers of the property sold were paying for the same in part by their checks, drawn in favor of the clerks, a course of business to which Jepsen, at the time of the sale and at the time of the purchases, made no objection. About the close of the sale Jepsen asked Flannigan as to the delivery of the proceeds of the sale, and to this question Flannigan replied that he would turn over the proceeds as soon as they had been entirely collected, and that he would make settlement with Jepsen in Stuart. Jepsen offered no protestation to this proposed plan of procedure. At the close of the sale Flannigan proceeded to Naper, and at the First National Bank at that place turned into that bank certain checks which had been received from purchasers at the sale. Some of these checks were drawn upon the Naper bank. Some were checks on other banks which were convenient for the Naper bank to handle in the course of collection. For convenience in taking the proceeds of the sale to Stuart, Flannigan asked that the First National Bank of Naper issue to him a cashier's check to cover the checks so cashed. The evidence discloses that this bank is a small one, and had not been in the habit of making

use of this class of negotiable instruments in its business, and was without the necessary blanks. It also appears quite evident from the record that it was short in cash and exchange, and in lieu of a cashier's certificate, and for the purpose of transmitting the proceeds of the checks that had been turned over to it, it issued to Flannigan a negotiable certificate of deposit, payable on demand and to his order, in payment for the checks drawn on itself, as well as those drawn on other banks which it had cashed for Flannigan, and which totaled $4,967.01. Included in this sum was the $1,737, the amount in suit, represented by checks drawn by Peacock and Short on the First National Bank of Butte, Nebraska, and which, duly indorsed, were turned over and delivered to the First National Bank of Naper, Nebraska, as part of the transaction just related.

Payment of these checks was refused on their presentation by the First National Bank of Butte, because of insufficient funds. This occurred on the 18th of November, 1930, and on the 20th following the checks were again presented for payment and again refused; at this time because of the demand made on behalf of the First National Bank of Omaha for the proceeds thereof. Ultimately the sum of $1,737 was, by order of court, paid to the clerk of the district court for Boyd county, where it remained awaiting the determination of its ownership by the trial court. On the 1st day of December, 1930, the certificate of deposit issued to John M. Flannigan was satisfied by the First National Bank of Naper. Evidence in the record sustains the conclusion that the entire proceeds of the Hoyt cattle sale, the facts of which have been heretofore recited, were deposited in the Citizens Bank of Stuart on November 20, 1930, to the credit of the Hoyts, where, so far as disclosed by the record, this sum still remains. It thus appears that John M. Flannigan was the agent of the appellant bank in the cattle transaction; that every act which was done at the sale was in pursuance to their express authority and indeed ratified and confirmed by their representative on the ground, and with knowledge of

the facts. The checks received were payable to the order of the person acting as clerk; the representative of the appellant bank made no objection to Flannigan's purpose, known to him, of retaining the checks and collecting them prior to making complete settlement. The $4,967.01 in checks was turned over to the First National Bank of Naper to accomplish this plan. A negotiable instrument for the convenience of Jepsen's agent was issued by the Naper bank to Flannigan, then acting as the agent of both Jepsen and the First National Bank of Omaha, for use in the transmittal of these proceeds to the Citizens Bank of Stuart, at which Flannigan was to make settlement with the Omaha bank's representative. It was actually deposited in the Citizens Bank of Stuart on the 20th day of November, 1930, to the credit of the Hoyts, and, so far as disclosed by the record, still remains in that condition. Wholly irrespective of the question of notice as to the consideration for which the checks were given, nothing has occurred which subjects the assets of the First National Bank of Naper to any charge on account of the business it transacted. In a manner contemplated and authorized by his instructions, Flannigan admittedly received and, in the usual course of business, cashed the checks, the proceeds of which are in suit. Under the circumstances the Naper bank became the *bona fide* owner thereof. There is nothing in the entire transaction upon which a right to a preference as the owner of a trust fund can be sustained against this defendant, the First National Bank of Naper.

It follows, therefore, that the action of the trial court in its finding and judgment for that institution is correct, and it is

AFFIRMED.

ESTHER JENNINGS, APPELLEE, V. FRANK BIURVALL, APPELLANT.

FILED FEBRUARY 11, 1932. No. 28088.

1. **Trial: EVIDENCE AS TO INDEMNITY INSURANCE: INSTRUCTION.** It is permissible in a personal injury suit to inquire of the defendant upon cross-examination whether or not he carries liability insurance, and whether he employed the attorneys acting in his behalf. It is proper, when an attempt is made to enlarge upon this limited field of inquiry, or if unsolicited evidence is volunteered by a witness, for the trial court to strike it out and instantly instruct the jury to disregard it.
2. **Automobiles: "RECKLESS OPERATION."** To constitute reckless operation of an automobile under the Iowa law, there must be such heedless rashness of conduct as manifests indifference to the consequences to the life, limb, health, or property of another.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Crofoot, Fraser, Connolly & Stryker, for appellant.

B. J. Boyle and *Wear, Moriarty, Garrotto & Boland, contra.*

Heard before GOSS, C. J., EBERLY and PAINE, JJ., and BEGLEY and ELDRED, District Judges.

PAINE, J.

The plaintiff and appellee, Esther Jennings, brought an action for personal injuries against Frank Biurvall, the defendant and appellant, who was driving an automobile which plunged off the road and into a gully about two miles northwest of Hinton, Iowa, on Saturday evening, January 17, 1931. The case was submitted to a jury, which returned a unanimous verdict for $3,000 upon May 28, 1931, for which amount a judgment was entered, and motion for new trial overruled.

The evidence in this case discloses that, at the time of the accident, the appellee, an emancipated minor, 19 years of age, was a stenographer in the Federal Land Bank at Omaha, earning $65 a month; that the appellant secured

the Viking sedan, in which they were riding, from his father, Adolph Biurvall, its owner, who died before the trial, and started from Omaha at about 3:00 p. m. on a week-end trip with the appellee, Esther Jennings, and Grace Kathan, who were roommates, who went as his guests, paying none of the expenses. They planned to go to Beresford, South Dakota, to visit the mother of the appellee. They reached Sioux City in three hours, and in leaving there got off the main highway by mistake.

All three of the parties were riding in the front seat, and were proceeding on a dark night, at about 6:30 in the evening, on a strange, unmarked and unimproved country cross-road, over which none of the parties had ever driven before, and which appellant admitted at the trial was the hilliest road coming out of Hinton that he had ever driven over, having in addition a number of turns in it. Appellant remarked at the time that they would have to hurry to reach Beresford at the time they had planned to get there, and the appellee looked at the speedometer and noted that they were driving 55 miles an hour, and immediately told the appellant that there was no need to hurry, that her folks would be there when they got there. The appellant replied that there was no danger, but diminished his speed slightly. They passed a Ford coupé going in the same direction, and the testimony of the father and two sons, named Schuttpelz, in the Ford was that the appellant was driving 40 to 45 miles an hour when he passed their car, which was within a quarter of a mile of a sharp turn, with a bridge just beyond; that the rails on the bridge were painted white, and while the car was being driven at about 50 miles an hour, Miss Kathan, seeing the bridge from 150 to 300 feet ahead, shouted, "My God! Frank, be careful." Appellant testifies that with his hydraulic brakes he could have stopped the car, going at that speed, in 30 feet, but he paid no heed and disregarded the warning entirely. The testimony discloses that the appellant, just before crashing through the guard-rail leading to the bridge, dropped his hands from the steering

wheel, and the car went through the guard-rail, which was a bridge plank 3 inches thick by 12 inches wide and 16 feet long, and down into a gully about 20 feet deep, turned over, headed in the opposite direction, and was nearly demolished. The farmers in the Ford car, upon arrival at the scene of the accident a moment later, found appellant crawling out and the two girls in the top of the car, which was upside down. They took all of the parties to the St. Joseph hospital in Sioux City. When asked in the hospital why he dropped his hands from the steering wheel, the appellant answered by saying that he had always heard that a baby didn't get hurt in an accident because it was relaxed, and therefore he dropped his hands and relaxed his body, without attempting to put on the brakes or slow down the car.

The appellee remained in the hospital in Sioux City for ten days, was then taken to her mother's home in Beresford, South Dakota, and upon returning to Omaha she attempted to return to her work as stenographer, but a few days later she fell over in a faint while at her work. She then placed herself under the care of Dr. Herman Johnson, of Lord, Schrock & Johnson, orthopedic specialists. They treated her at St. Catherine's hospital, applied traction to her head and neck, secured a neck-brace for her, which she wore for some time, but when she removed the brace the pain was so severe that she had to continue its use, and was wearing it during the trial. Her most serious injury was an injury of the neck vertebræ, near the base of the skull, which made an irritation to the spinal cord, because of which injury she was compelled to wear the neck-brace, and suffered great pain. In addition to this, she had an injury to her right leg, which remained more or less numb for ten days, and in which the reflexes were affected, due to nerve trouble. She was troubled with severe pains and headaches, but Dr. Johnson was not able at the time of the trial to tell whether her injuries would be permanent or not. In addition to her pain and suffering, plaintiff suffered the loss of all garments she had on,

which were ruined by battery acid, the loss of her handbag, with $15 in cash, and other financial losses for hospital and doctor bills made her total expense up to the time of the trial amount to $700.

1. The assignments of error set out by appellant are as follows: (1) That the court refused to give a directed verdict; (2) that the court admitted improper evidence over defendant's objection; that the appellant was being defended by attorneys employed by an insurance company; (3) that the court erred in refusing to give instruction No. 3 offered by the appellant, which defined the word "reckless;" and (4) that the damages awarded by the jury are excessive.

The second assignment of error is directed to evidence which was brought out in the direct examination of the witness Grace Kathan. She was asked whether the appellant had ever given her any directions after the accident, and she replied that he had given her a slip of paper with Attorney Connolly's name on it and told her she was to see Mr. Connolly. "Q. Did he tell you who Mr. Connolly was? A. Yes. He said he was the claim agent for the insurance company, and I was to talk to him for a settlement." Motion was made by Mr. Connolly to strike out the answer on the ground that it was incompetent, irrelevant and immaterial, and given for the sole purpose of prejudicing this jury against the defendant, upon which Judge Redick made the following ruling: "I will strike it out, and the jury will pay no attention to that testimony; it is improper; I supposed it was for an admission of the defendant."

This court has held that it is permissible in a personal injury suit to inquire of the defendant upon cross-examination as to whether or not he carries liability insurance, and whether he personally employed the attorneys for the defense. *Miller v. Central Taxi Co.*, 110 Neb. 306; *Jessup v. Davis*, 115 Neb. 1; *Sloan v. Harrington*, 117 Neb. 809; *Sorensen v. Grand Island Clinic*, 119 Neb. 280; *Combs v. Owens Motor Co.*, 121 Neb. 5. This is for the sole pur-

pose of informing all parties as to the true status in reference to these matters. Until modified, it is binding upon the trial court. But this court has not enlarged the rule as first laid down, and when it is violated a reversal followed, as in *Lewis v. Beckard*, 118 Neb. 533. The ruling of the trial court in striking out evidence in reference to liability insurance not warranted by the rule is approved.

2. The assignment of error based upon the refusal of the trial judge to give a long instruction defining recklessness can only be clarified by setting out instruction No. 4 given by the trial judge, which reads as follows:

"The jury are instructed that the accident in question occurred in the state of Iowa, and the rights of the parties are governed by the laws of that state as set forth in the pleadings. The statute of Iowa provides as follows:

" 'The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, unless damage is caused as a result of the driver of said motor vehicle being under the influence of intoxicating liquor or because of the reckless operation by him of such motor vehicle.'

"It is not claimed that the defendant was intoxicated; the only ground of recovery alleged by plaintiff is that she suffered the injuries of which she complains because of the reckless operation by defendant of the automobile at or about the time of the accident.

"With regard to this term 'reckless' in the statute, you are instructed that it was the evident intention of the legislature to exempt the driver of an automobile from liability for injuries suffered by the guest because of ordinary negligence of the driver and permit his recovery only when such injuries were the result of recklessness (or intoxication). It is therefore necessary to distinguish between negligence and recklessness in the determination of this case. Negligence is the doing of some act under the circumstances of the accident that an ordinarily prudent person would not have done, or the failure to do some act

or to take some precaution which a person of ordinary prudence would have done or taken. Recklessness is heedlessness, or indifference to the rights of others or of the consequences of one's acts; it signifies the driving of an automobile carelessly and heedlessly in a reckless disregard of the rights of others, or of the consequences.

To constitute reckless operation of an automobile, there must be such heedless rashness of conduct as manifests indifference to the consequences to the life, limb, health or property of another. All of these elements are contained within the instruction of the trial court. Admitting that the instruction submitted contains nothing improper, yet the trial court is not bound to give a long instruction submitted if he has covered its main points in one of his own. We have held in another case involving this Iowa guest law that whether the reckless operation of an automobile caused injuries to a passenger is a question for the jury to determine. *Graham v. Higgins,* 121 Neb. 211.

The finding of gross negligence which made a motorist liable for injuries to a guest has been held warranted by excessive speed and driving in a zigzag manner. *Smiddy v. O'Neil,* 177 N. E. (Mass.) 809.

The defendant acted in such utter disregard of the dictates of prudence as amounted to a complete neglect of the safety of his guests and warranted a finding that the accident and injury were caused by the defendant's gross negligence. *Cole v. Morse,* 155 A. (N. H.) 694.

All of the facts in the case at bar, the speed of this car over an unknown, unmarked country road, which was hilly and had many turns, driving after dark, approaching a sharp turn, not banked, with a bridge immediately beyond, without slackening speed, the wrecking of the car, the injuries sustained, all these facts were submitted to the jury under proper instructions, and the verdict of $3,000 returned by the jury is sustained by the evidence, and the same is hereby

AFFIRMED.

STATE BANK OF OMAHA, APPELLANT, V. F. P. TODD, APPELLEE.

FILED FEBRUARY 11, 1932. No. 28010.

Bills and Notes: ACCOMMODATION NOTE: SET-OFF. Where a defendant without consideration executes and delivers an accommodation note to a bank for the purpose of enabling said bank to obtain money or credit thereon, and said bank did obtain credit thereon from the plaintiff bank with full knowledge and consent of plaintiff and that plaintiff agreed to such arrangement, and that said accommodated bank thereafter became insolvent and passed into the hands of a receiver, then the defendant, when sued, would be entitled to an equitable set-off of any indebtedness due from plaintiff to said accommodated bank, if any, which was due at the time said bank was closed and passed into the hands of the receiver.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

E. D. Crites and *F. A. Crites*, for appellant.

J. E. Porter, contra.

Heard before GOSS, C. J., EBERLY and PAINE, JJ., and BEGLEY and ELDRED, District Judges.

BEGLEY, District Judge.

This is an action brought by the State Bank of Omaha to recover on a note for $2,000, executed and delivered to plaintiff by defendant. The defendant in its answer admitted execution and delivery of the note, denied consideration therefor, and further alleged that same was a renewal of a note for like amount, given as an accommodation note to the Farmers Bank of Crawford as a part of the same transaction, to enable said bank to pledge same as collateral security for a note for the loan of $15,000 from plaintiff to said bank, and that said principal note has been fully paid and there is nothing due or owing on the note herein sued upon. The reply was a general denial, with allegations to the effect that the note is complete on its face; that plaintiff is a holder in due course, and that by reason of renewals defendant is estopped to deny liability thereon.

The following facts are established by the evidence: In June, 1922, the defendant was a stockholder in the Farmers Bank of Crawford; said bank was in financial difficulties; the state guaranty fund commission had taken charge of and temporarily closed it. Negotiations were begun with the commission for the purpose of reopening same. One J. P. Palmer, an attorney and agent for the guaranty fund commission, Erwin Kleeman, president of the Farmers Bank of Crawford and defendant and others, met in Omaha at the offices of plaintiff, with Mr. Schantz, its president, and the sum of $15,000 was raised and paid into said bank in the following manner: Mr. Palmer and Mr. Kleeman executed and delivered to plaintiff their note for $15,000. Plaintiff loaned them the $15,000 which was deposited on a time certificate of deposit in the Farmers Bank of Crawford and then assigned to the plaintiff as collateral. Other notes and certificates were made and assigned to plaintiff, also as collateral, including an accommodation note of $2,000 from defendant to the Farmers Bank of Crawford and also assigned to the plaintiff. When this note came due it was renewed twice by defendant, the renewals being made payable direct to plaintiff.

The bank was reopened and continued as a going bank for a short period and was finally declared insolvent and liquidated out. All parties to said transaction assumed that the certificate of deposit of $15,000 would, in case of insolvency of the bank, be held to be a valid deposit and be payable from the state guaranty fund; but, after the bank was closed, Mr. Palmer filed same as a claim and it was disallowed; this court holding that the transaction constituted a loan from plaintiff to the Farmers Bank of Crawford, and not a valid deposit against the guaranty fund. The amount of the $15,000 was reduced to $4,100 before the Farmers Bank was closed.

The evidence shows that plaintiff bank was the city correspondent of the Farmers Bank of Crawford and at times had various deposits in its bank to the credit of the Farmers Bank of Crawford. There is a discrepancy in the books

of the different banks as to the balance on hand at the time of the closing of the Farmers Bank. The books of the plaintiff show an overdraft in the sum of $4,027.31, while the books of the Farmers Bank show a balance due it at the date of closing of $5,342.69. This difference is explained by the evidence of defendant in showing that one F. M. Stapleton was formerly cashier and general manager of the Farmers Bank and at such time gave his personal note to plaintiff amounting to the sum of $9,370; that he defaulted in payment of the same and that on January 3, 1922, the plaintiff, without authority of the Farmers Bank and without its knowledge, charged against and deducted from the Farmers Bank account the amount of this note, leaving an overdraft on the plaintiff's books in the sum of $4,027.31. Stapleton kept the transaction covered in the Farmers Bank and it was never shown as a debit on that bank's books. There is no evidence that the note was an obligation of the bank or that Stapleton acted other than in his individual capacity in the transaction, and in view of the provisions of our statute that no officer or employee of a state bank shall be permitted to borrow any of the funds of the bank, directly or indirectly, it will be presumed to have been his personal obligation.

The only issue submitted by the court to the jury was the defense raised by the defendant as to payment and the right to an equitable set-off. The court submitted the following instruction, of which the plaintiff complains:

"You are instructed that if the defendant has established by a preponderance of the evidence that the original note for $2,000, of which the note in suit is a renewal, together with the notes of Smith, Palmer and Kleeman were given without consideration therefor passing to said makers, and for the purpose of lending their names to the Farmers Bank of Crawford, and for the purpose of enabling said Crawford bank to obtain money or credit thereon from the plaintiff bank and as collateral therefor, and that said Crawford bank did obtain credit thereon from the plain-

tiff in the sum of $15,000, and it issued its certificate of deposit therefor as security for said loan; and if the defendant has further established by a preponderance of the evidence that all of this was done by and with the full knowledge and consent of the plaintiff herein, and that said plaintiff bank agreed to said arrangement, then the defendant would be entitled to offset the indebtedness due from the plaintiff to the Farmers Bank of Crawford that is now due and that was also due at the time said bank was closed and passed into the hands of the receiver, if any. And even if the defendant has established the foregoing propositions by a preponderance of the evidence, then before he is entitled to a verdict herein he must further establish by a preponderance of the evidence that at the present time, and at the time the Farmers Bank of Crawford was closed and passed into the hands of the receiver, the plaintiff bank was indebted to said Crawford bank in the sum in excess of $4,100, and interest, claimed by plaintiff to be the balance due on the original loan of $15,000.

"If the defendant has failed to establish each one and all of the foregoing propositions by a preponderance of the evidence, or if the evidence thereto be evenly balanced or preponderates in favor of the plaintiff, then your verdict must be for the plaintiff for the sum of $2,000 with interest thereon at 8 per cent. per annum from the 5th day of June, 1923."

Appellant alleges error on the admission of oral testimony to dispute the terms of its note and also evidence to show that defendant is entitled to an equitable set-off. The notes were all made as part of the same transaction and not as collateral for any antecedent debt. The plaintiff bank had full knowledge of all the circumstances; took active part in the negotiations, and took the note direct to itself. It cannot under such circumstances complain of the admission of this evidence. 3 R. C. L. 870, sec. 54; 49 C. J. 1022. In the case of *Benton v. Sikyta,* 84 Neb. 808, this court held: "If the note is invalid between the

immediate parties, one who holds it as collateral security may only recover the amount of his claim to which said note is collateral." The case of *National Bank of Commerce v. Bottolfson*, 55 S. Dak. 196, is somewhat similar as to the order of pleading. The court held: "Where plaintiff suing on note alleged title as owner, but facts shown by plaintiff at trial demonstrated plaintiff was holder of note for purposes of collateral, plaintiff had burden of proving amount, if any, due on main obligation from payee to plaintiff." See, also, 49 C. J. 1030. Under our Code of Civil Procedure the distinction between actions at law and suits in equity is abolished. Comp. St. 1929, sec. 20-101. The defendant had the right to plead and prove an equitable set-off in this action, where the Farmers Bank of Crawford is shown to be insolvent. *Pierce v. Atwood*, 64 Neb. 92.

The case was properly submitted to the jury by the trial court and we find no prejudicial error in the record. The judgment of the district court is therefore

AFFIRMED.

PRUDENTIAL INSURANCE COMPANY, APPELLEE, V. CLARENCE G. BLISS, RECEIVER, APPELLANT.

FILED FEBRUARY 11, 1932. No. 28031.

1. Courts: CONCURRENT JURISDICTION. Where property is in actual or constructive possession of and subject to the jurisdiction of one court, another court of concurrent jurisdiction cannot interfere with that possession.
2. Mortgages: FORECLOSURE: RECEIVERSHIP. Where property is in the possession of a receiver appointed in proceedings to liquidate an insolvent bank, the statutory proceedings relating to the appointment of a receiver in a foreclosure suit are inapplicable.
3. ———: ———: ———. Where such statutory provisions are inapplicable, it is error for the court in the foreclosure action to name a trustee "to hold" the rents and profits in an endeavor to accomplish the same purpose. The mortgagee must look to the court having jurisdiction of the liquidation of the insolvent bank for any relief which involves an interference with the possession of the receiver of the latter.

APPEAL from the district court for Boone county: LOUIS LIGHTNER, JUDGE. *Reversed, with directions.*

Moyer & Moyer and *F. C. Radke,* for appellant.

Williams & Williams, Raymond J. Gibbons and *Quintard Joyner, contra.*

Heard before ROSE, GOOD and DAY, JJ., and FROST and MESSMORE, District Judges.

FROST, District Judge.

This is a foreclosure suit commenced in the district court for Boone county in which the mortgagee, plaintiff, applied for the appointment of a receiver. A hearing was had and the trial court made a finding that the mortgaged property was probably insufficient to discharge the mortgage and that the plaintiff would, under ordinary circumstances, be entitled to a receiver. However, the court further found that the Newman Grove State Bank held the title to the real estate involved in the foreclosure suit, and that that bank was in the hands of a receiver, and the court was in doubt whether a receiver could be appointed under such circumstances. The court then ordered Harry Henatsch, the assistant to the receiver in charge of said bank, "to hold the 1931 and subsequent rents and profits from said real estate pending this litigation, and if said real estate at the foreclosure sale sells for less than the total liens found against it in this suit, then and in such case the plaintiff or any cross-petitioner who has obtained a deficiency judgment may apply to any court having jurisdiction over the matter for an order to apply any proceeds in his hands derived from the 1931 and subsequent crops to said deficiency."

The evidence shows that Clarence G. Bliss, secretary of the department of trade and commerce, in 1929 had been appointed receiver of the Newman Grove State Bank by the district court for Madison county; also that at the time of the commencement of the foreclosure suit Bliss, as such receiver, had possession and control of the real estate

covered by the mortgage. The bank receivership, therefore, was already functioning in January, 1931, when the Prudential Insurance Company, the appellee herein, commenced the foreclosure suit. In February, 1931, the insurance company applied for the appointment of a receiver to take charge of the real estate and to collect the rents and profits, claiming that the property was probably insufficient to pay the mortgage debt. Due notice was given of this application to Bliss as receiver and a hearing was had in the district court for Boone county, and on March 25, 1931, the court made the order already referred to. Bliss, as receiver, has appealed from that order.

The first receiver had been appointed under the provisions of the statute relating to the liquidation of an insolvent bank. No question has been raised as to the regularity of the appointment of the secretary of the department of trade and commerce as such receiver or of the order for the liquidation of the Newman Grove State Bank as an insolvent institution. Mr. Bliss' duties as receiver required him to take possession of the assets of the insolvent bank and in this way he acquired the possession of the real estate involved in the foreclosure suit.

The real estate is located in Boone county and the foreclosure suit, in accordance with section 20-2139, Comp. St. 1929, was commenced in the district court for that county. The court found that the mortgaged property was probably insufficient to pay the debt, with which finding we have no complaint. But to have appointed a receiver, the only way to give the rents to mortgagee pending the foreclosure, would have resulted in a conflict of jurisdiction.

Because of conflicts of similar character it has been necessary for the courts to work out a rule of comity. The rule thus evolved is a sensible one, to wit: Where property is in actual or constructive possession of and subject to the jurisdiction of one court, another court of concurrent jurisdiction cannot interfere with that possession. *Moran v. Sturges,* 154 U. S. 256; *Terry v. State,* 77 Neb.

612; *Ryan v. Donley,* 69 Neb. 623; *Leigh v. Green,* 62 Neb. 344.

Chief Justice Fuller in *Moran v. Sturges, supra,* states the rule as follows: "It is a rule of general application that where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court."

In *Terry v. State, supra,* the same rule is expressed, as follows: "It is a well-settled rule that where one court of competent jurisdiction in a proceeding *in rem* obtains jurisdiction of the *res,* or, in other words, the thing in controversy, no other court can acquire jurisdiction over it. 'It is a rule well known to the profession that where two courts have concurrent jurisdiction, that which first takes cognizance of the case has the right to retain it to the exclusion of the other; that where property is *in gremio legis,* if it be a court of rightful jurisdiction, no other court can interfere and wrest from it the jurisdiction first obtained.' "

In *Leigh v. Green, supra,* there is an excellent discussion of the rule covering the jurisdiction of different courts over the same property. In that case Commissioner Albert sustains the validity of a tax foreclosure which was carried on, although a prior attachment suit was pending in the federal courts. He admits that the doctrine of the supreme court of the United States is: "When two courts have concurrent jurisdiction, that which first takes cognizance of the cause has the right to retain it to the exclusion of the other; that where property is *in gremio legis,* if it be a court of rightful jurisdiction, no other court can interfere and wrest from it the possession and jurisdiction first obtained; and that a sale, under an order of one court, of property in the custody or possession of another conveys no title." He then cites a large number of authorities from the supreme court of the United States. Judge Albert's opinion then continues: "This rule has its foundation, it would appear, not merely in comity, but in necessity; for were it otherwise, the orders of one court

might be offset by those of another, and the parties left without any remedy; besides, in their rivalry for possession of property in controversy, a conflict would arise that would not only be embarrassing in the administration of justice, but would be liable to lead to unseemly strife and personal conflicts between the officers of the different courts. A study of the cases cited shows that in each case the property was in the actual or constructive possession of the court whose jurisdiction was invaded. The decisions are based, in most cases, upon the facts that the subsequent proceedings in another court would interfere with such possession." Judge Albert, after recognizing the general rule of comity between courts covering their jurisdiction over the same property, then differentiates the position of the parties in *Leigh v. Green,* and concludes that the distinction is that in the attachment the federal court, by its levy, did not obtain possession of the real estate.

The failure of the court in the foreclosure to appoint a receiver is a recognition of the legal principle involved in the decisions just referred to; that is, that one court cannot interfere with the property already in the possession of another court. The mortgagee argues that as the findings of the trial court would entitle it to a receiver in the foreclosure suit, except for the priority of possession in the bank insolvency case, it was entitled to the relief given by the order of March 25, 1931. We fully concur in the mortgagee's contention that it is entitled to relief that it might have received through a receivership. However, we cannot agree with the method by which the court undertook to give those rights. The difference, then, is one of procedure. When it developed in the foreclosure suit that another court had possession of property involved and that a receiver could not be appointed as provided by statute in a foreclosure suit, the court in that suit was powerless to give the mortgagee possession through the appointment of a receiver, notwithstanding that was the only method for granting relief open in the foreclosure suit. *Huston v. Canfield,* 57 Neb. 345.

We agree with the bank receiver's contention that the only assignment of error of the appellant that need be considered is that relating to the order of March 25, 1931, which authorized Henatsch to hold the rents pending the conclusion of the foreclosure suit. Does this order interfere with the rule of comity between courts? The order directs him "to hold the 1931 and subsequent rents and profits from said real estate pending this litigation." In order to hold these rents he must in some way come into possession of them. With a receiver already in possession, no legal method was open to Henatsch to carry out this order without interfering with the prior possession of that receiver.

We are not unmindful of the claim of the insurance company, mortgagee, that Henatsch is referred to in the order as "assistant to the receiver in charge of said bank," but this designation is simply descriptive and the order deals with Henatsch as an individual. *Andres v. Kridler*, 47 Neb. 585; *Western Wheeled Scraper Co. v. McMillen*, 71 Neb. 686. Both of these cases are suits upon promissory notes wherein the signers are identified following their signatures as directors of companies which they represented. Notwithstanding these identifications, the court in both cases hold that such designations should be rejected as *descriptio personæ* and that the defendants are sued as individuals.

A recent decision of this court fully justifies the trial court in refusing to appoint a receiver. We refer to the case of *Wells v. Farmers State Bank*, 121 Neb. 462. This case is quite similar to the one at bar, in that the property involved in the mortgage foreclosure was already in possession of the receiver appointed to liquidate the affairs of an insolvent bank. In the opinion this court said that the statute authorizing the appointment of a receiver in a mortgage foreclosure action is inapplicable where such property was at the time under the control of another receiver. The court also in the *Wells* case decided that there was no valid reason why the receiver in the bank insolvency case could not also act in the foreclosure suit.

The supreme court of South Dakota in handling a similar situation held that the exclusive possession and control of property of an insolvent bank are in the superintendent of banks after such bank is taken over by him, subject to the authority of the circuit court of the county of the bank's domicile. That court, in concluding its opinion, suggests the remedy that is available to the mortgagee when such legal complications develop: "We can see no reason why a mortgagee, who, under the provisions of subdivision 2 of section 2475, Rev. Code 1919, would in an ordinary case be entitled to relief through the appointment of a receiver, may not get the same relief by application to the court in the insolvency proceedings. If he can, and we so hold, then the machinery provided for securing relief under that section must give way to the machinery provided for winding up the affairs of an insolvent bank. Not only will there then be no conflict of jurisdiction between courts and between the superintendent on the one hand and a receiver on the other, but the estate of the insolvent bank will be saved the expense of the receivership." *Hanson v. Sogn*, 50 S. Dak. 44.

We therefore conclude that the order of March 25, 1931, must be and hereby is reversed and the cause remanded, with directions to the district court to vacate the order of March 25, 1931, and to dismiss the application for the appointment of a receiver at the cost of the applicant.

REVERSED.

O. C. ELLIS, APPELLEE, V. OMAHA COLD STORAGE COMPANY, APPELLANT.

FILED FEBRUARY 11, 1932. No. 27847.

Appeal: REVERSAL. "Where a verdict is against the clear weight of evidence so that it cannot be sustained on any principle of right or justice, it is the duty of the court to set it aside." *Clark v. Gell*, 17 Neb. 284.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Reversed, with directions.*

Brogan, Ellick & Van Dusen, for appellant.

Leon & White, contra.

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and RAPER and RYAN, District Judges.

RAPER, District Judge.

The appellee, plaintiff below, in his amended petition alleges that he was employed by the defendant company, appellant, in its office from 1920 to March 31, 1928; that the fiscal year of defendant company during said period commenced on April 1, and ended March 31 of the year following; that about May, 1927, the plaintiff received a bonus from defendant of $450 in cash, for the fiscal year preceding March 31, 1927; that about June, 1927, the defendant company by its general manager and vice-president entered into an oral agreement with plaintiff that if plaintiff would remain in the employ of defendant until March 31, 1928, the defendant would pay to plaintiff a bonus at the end of that fiscal year, not less than $450, and would be equal to the bonus paid plaintiff for the previous year, provided the defendant made a profit during the year and paid a bonus to other office employees for said fiscal year; that pursuant to said agreement plaintiff did remain in the defendant's employ until March 31, 1928, and defendant did make a profit and did pay a bonus to other office employees. Plaintiff asks judgment for $450 with interest.

The defendant company in its answer denies the allegations in the petition, except certain admissions. It admits the employment of plaintiff, and that plaintiff received a bonus for the year ending March 31, 1927, of $450, and alleges that defendant has been paid all amounts due him as such employee. The defendant further alleges that plaintiff on September 19, 1929, began an action on said alleged claim for the bonus in the municipal court in Omaha, wherein he based his said claim upon an oral agreement that, if plaintiff would remain in the employ of the defendant continuously from some time in June, 1927,

to March 31, 1928, the defendant company would pay to plaintiff a bonus at the end of the fiscal year ending March 31, 1928, which bonus would be based on his weekly salary and extra monthly check drawn from April 1, 1927, to March 31, 1928, and that in addition said bonus would be in a sum based on the defendant's profits, and upon bonuses paid to other employees who received a salary during said period in an amount equal to the salary received by plaintiff. The defendant resisted that claim and denied the alleged agreement, and defended said action in said municipal court; and on a trial of said cause on October 2, 1929, plaintiff testified under oath in said court that said oral contract was as set forth in his petition, and was his complete agreement with the defendant; that during the course of the cross-examination of plaintiff he voluntarily dismissed the action; that thereafter the plaintiff, on October 2, 1929, commenced an action in the district court for Douglas county, upon the same claim, wherein plaintiff in his petition based his claim upon the agreement as alleged in the petition in the municipal court. The defendant answered said petition denying the alleged agreement, and upon a trial to a jury in the district court, on January 27, 1930, said plaintiff again testified that the contract as made by him with defendant was as set forth in his petition filed therein; that during the course of the examination of plaintiff and upon said trial, the court indicating that said contract was too indefinite and uncertain for enforcement, plaintiff voluntarily dismissed said action without prejudice, and thereupon brought this action, alleging said agreement as set forth in the petition, and defendant pleads that plaintiff is estopped from asserting said oral agreement to be as alleged in the petition filed in this case. Plaintiff replied and the cause was tried to a jury, and verdict and judgment given in favor of plaintiff for amount claimed. Defendant company appeals. At the close of the testimony, the defendant moved the court to direct a verdict in its favor. The motion was overruled.

At the trial it was admitted that the defendant made a profit for that year and paid bonuses to other office employees. The plaintiff, Ellis, testified in the trial to substantially the facts alleged in the petition. His testimony was disputed by Mr. Hyson, the vice-president and manager of the defendant company, the person with whom Ellis said he made the agreement. Mr. Hyson denied that he had any such agreement, and denied that he promised or agreed to pay any bonus, and said nothing was mentioned in the conversation about paying a bonus to Ellis. Ellis voluntarily quit the employ of the company on the 31st day of March, 1928, and was paid his salary to that date, without anything being mentioned about a bonus. The first reference to a bonus was in a letter written by appellee to Mr. Hyson on July 20, 1929, in which he said: "Would like to have you review your record of salary paid me during the period April 1, 1927, to March 31, 1928, and believe you will find that in line with your verbal agreement an additional amount is due me, based on considerations accorded employees as of record March 31, 1928; also conforming to practices of the previous year, as well as years prior to that. You appreciate that I completed the full year and should have been given consideration the same as others, at least to the extent of equaling my salary the previous year." Mr. Hyson did not reply to this letter. Mr. Ellis was paid a larger salary for that year.

About six or seven weeks after March 31, 1928, Mr. Ellis talked to Mr. Hyson about getting his job back, and at that time made no mention of a bonus. On September 19, 1929, appellee began an action against appellant in the municipal court in Omaha, and in that case alleged his employment, and that it was the practice and custom of the company, and particularly with plaintiff, to pay such employees in a three-fold manner, to wit, (1) a regular weekly salary; (2) an additional monthly salary; (3) a lump sum payment at the end of each fiscal year ending March 31, known as a bonus, based on the profits of the defendant company for the fiscal year immediately preceding; that plaintiff's

salary and manner of employment was based on said threefold manner of payment; that about the month of June, 1927, the defendant company by and through its vice-president and general manager entered into an oral agreement that if plaintiff would remain in the employ of the defendant company until March 31, 1928, then the company would pay plaintiff a bonus at the end of that fiscal year, which bonus would be based on his weekly salary and extra monthly check drawn from April 1, 1927, to March 1, 1928, and that in addition said bonus would be in a sum based on the profits of the company on the fiscal year and based on the bonus paid to other employees of the defendant company who received a salary during said period in an amount equal to the salary received by plaintiff. He then alleges the amount of his salary, and that the company did earn a profit, and the petition continues: "That based upon the agreement of June, 1927, the profits of the company during said fiscal year ending March 31, 1928, and the bonus paid to the other office employees for said period receiving a salary in an amount equal to plaintiff's salary, and based upon the general practice and custom of previous years, plaintiff was entitled to receive a bonus of $750." And he prayed for judgment of $750 and interest. The defendant answered and trial had.

Appellee was examined as a witness in that case, and testified to substantially the allegations of that petition, and that in the conversation Mr. Hyson told him, " 'We cannot pay bonuses unless we make profits.' And he says, 'Bonuses are based on our profits.' And he says, 'In the event we don't make profits, and we pay anybody else bonuses, we will give you the same consideration as we give others in accordance with the salary you draw.' " (The word "don't" as above quoted evidently means "do.") And Mr. Hyson stated that if plaintiff remained in the employment of the company for the remainder of the year and they made a profit then the company would pay plaintiff a bonus and give him the same consideration they gave other employees. Plaintiff was questioned as to whether

he had stated all the conversation and said he had told what he remembered and had gone over his testimony with counsel in preparation for the trial. At the conclusion of his testimony in municipal court, his counsel dismissed the case without prejudice. Immediately after that dismissal plaintiff filed a verified petition in the district court alleging the identical cause of action in almost the exact words of the municipal court petition. The defendant answered, and went to trial in district court before Judge Wright, about January 27, 1930. At that trial plaintiff again testified and gave the verbal agreement with Mr. Hyson in the same language as his testimony in municipal court, and again stated the agreement about the bonus, and that Mr. Hyson said: "If I would stay he would give me the salary as I had been having in the past; and on any bonus it would be based on what they paid the other employees; also as to whether or not they made a profit, and that bonus would be commensurate with the profit that they did make for that year." At the close of plaintiff's direct testimony, plaintiff dismissed the action without prejudice.

On January 31, 1930, appellee herein, as plaintiff, began this action.

In neither of the first two cases he brought did appellee allege or testify that anything was said in the conversation or agreement with Mr. Hyson about appellee receiving the same bonus as the previous year, nor did he mention the sum of $450 as the bonus he was to receive. He admitted in his examination that the reason he did not mention the $450 or that he was to receive the same bonus as the previous year, was because he felt that he drew more salary and would be entitled to $750, and did not want to prejudice his claim for the $750 by mentioning the part of the conversation that would limit his claim to $450. In the first two actions he admits he omitted to state the particular and necessary part of the alleged agreement that would give him the right to recover in order to gain an advantage of the $300, additional to what he was claiming in his last petition.

Appellant stated in his testimony that the practice of the company in previous years was to give bonuses in an amount not determined by either the salary or anything else except what the company thought the employees should have, and the bonus paid to the employees in former years was not uniform as to amounts, nor uniform as to salaries, but was based on what the company determined ought to be given. It may be said that under the practice of the company in former years the bonus paid was a mere gratuity and not based on any agreement, and appellee was aware of it. In his letter asking for bonus, while it does mention a verbal agreement, he evidently was urging his claim upon the said practice of previous years, and not upon any express agreement to receive any definite amount.

In the first two petitions he bases his claim upon the practice of the company to pay employees in the three-fold manner alleged, and his testimony in those two cases shows beyond question that he was not basing his cause of action upon any express agreement as to the amount of the bonus, as he now claims in this, his third attempt to establish a case that would be definite enough to sustain a judgment.

The appellee in the first two cases, if he is to be believed in this case, purposely did not tell the whole truth. The wilful suppression of a material fact is as inexcusable and unjustifiable in a witness as to wilfully misstate a material fact. And there is a strong inference from his letter, and his petitions and testimony in the first two cases, that no statement was made by Mr. Hyson that appellee would be paid $450, or a bonus equal to the bonus paid for the previous year. Only two persons were present at the conversation and only the one conversation was had. Mr. Hyson denies it. He is an interested witness, but had no greater interest than Mr. Ellis.

The appellee insists that the credibility of the testimony of the plaintiff in the case was exclusively for the jury to determine, and that the decision of a question of fact by a jury upon conflicting evidence should not be disturbed on appeal. Courts are careful to avoid invading the province

of a jury, and it is the general rule that where the evidence as to any material issue is such that different conclusions might reasonably be drawn therefrom the issue is one of fact for the jury, and not of law for the court. But there are limitations to this rule. In *Caniglia v. Vacanti*, 106 Neb. 793, the rule is thus stated: "A verdict of a jury, based upon sufficient evidence to support it, and which cannot be said by the court to be clearly wrong, will not be set aside merely because it appears to be against the weight or preponderance of the evidence, as the weight of the testimony is for the jury, and not for the appellate court." In *Trute v. Holden*, 118 Neb. 449, it is held as the law of this state: "A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside." In *Urban v. Novotny*, 107 Neb. 384, the court held that the jury disregarded material facts, and the verdict must be set aside. Again, in *Exchange Bank v. Gifford*, 102 Neb. 324, a verdict was set aside because the jury disregarded material evidence. In that case the defendant testified positively that he did not sign the note sued upon, but this court found that his evidence was overcome by opposing testimony and the verdict was set aside. That case is a good illustration of the application of the rule announced in *Trute v. Holden, supra*. And in *Clark v. Gell*, 17 Neb. 284, this court said: "Where a verdict is against the clear weight of evidence so that it cannot be sustained on any principle of right or justice, it is the duty of the court to set it aside." There are a great many cases reported in our state both in civil and criminal cases, and indeed in all the other states, to the same effect.

A principle of law applicable in this case is given in *Smith v. Boston Elevated R. Co.*, 184 Fed. 387, 106 C. C. A. 497, 37 L. R. A. n.s. 429, which arose on the second trial of the action. In the second trial plaintiff testified to a version of the accident that was inconsistent with her testimony at the first trial. The opinion says: "As the incon-

sistency is in the testimony of a party, a stricter rule is applicable than where the inconsistency is in the testimony of an ordinary witness. * * * While it is true that upon a second trial the plaintiff's case may be changed or strengthened by new testimony, yet the right of a plaintiff at a second trial to make by his own testimony a complete departure from the case presented at the first trial is not unlimited. A plaintiff, we think, after having sworn to facts resting in his own observation and knowledge before one jury, should not be permitted to swear to facts directly inconsistent and to obtain from a second jury a verdict in his favor which will involve the conclusion that his testimony at the first trial was knowingly false. A party testifying under oath is more than a mere witness. He is an actor seeking the intervention of the judicial power in his behalf, and thus subject to the rule *'allegans contraria non est audiendus,'* which, as stated in Broom's Legal Maxims, page 130, 'expresses in technical language the trite saying of Lord Kenyon that a man should not be permitted to "blow hot and cold" with reference to the same transaction, or insist at different times, on the truth of each of two conflicting allegations according to the promptings of his private interest.' " The court refused her right to recover on her changed testimony.

There is another feature that cannot be overlooked. The appellee in the first two cases was experimenting or toying with the courts. Two futile attempts were made by suppressing material evidence to get favorable judicial action on a claim that he later found could not be sustained, and the defendant was put to the trouble and expense of preparation and participation in those two cases. Such conduct on the part of appellee cannot be sanctioned. To do so would encourage any number of actions on one theory of a transaction, and on failure to get a favorable opinion of the trial judge, to dismiss without prejudice, and start anew on the same or an inconsistent cause of action, and thus harass a defendant without limit, and further to sanction the indefensible feature that one has the right by

repeated efforts to impose on the courts by a false claim and then change his position to meet the exigencies of his case by allegations and testimony inconsistent with the claims and testimony in his prior cases. This of course does not imply that a plaintiff may not dismiss an action without prejudice, nor do we mean to state that when a party has more than one remedy he may not pursue one without being estopped from maintaining another if defeated on his first action. There have been no cases cited, nor has independent research found a case parallel to this.

The evidence is such that the verdict cannot be sustained and for that reason is set aside. Inasmuch as appellee's testimony cannot be corroborated, or substantiated by additional testimony, the judgment is reversed and the cause remanded, with instructions to render judgment against the appellee and dismiss his petition at his cost.

REVERSED.

JAMES W. AULD, APPELLEE, V. JESSICA C. AULD, APPELLEE: STEWART, STEWART & WHITWORTH, APPELLANTS.

FILED FEBRUARY 11, 1932. No. 28072.

1. **Divorce**: ATTORNEY'S FEES. In a divorce action, some pleading or application by the wife must first be filed before the court can be justified in entertaining allowances for her counsel.
2. **Evidence**: PRESUMPTIONS. Ordinarily, in a civil action, a presumption is not evidence, but a mere rule of law, and disappears when evidence on the subject is given.

APPEAL from the district court for Webster county: J. W. JAMES, JUDGE. *Affirmed.*

Stewart, Stewart & Whitworth, pro se.

Bernard McNeny, J. S. Gilham and *L. A. Sprague, contra.*

Heard before ROSE, DEAN, GOOD and DAY, JJ., and THOMSEN, District Judge.

THOMSEN, District Judge.

This is an appeal from an order of the district court striking from the files an application for allowance of attorneys' fees in a divorce action. Appellants were consulted and employed by the wife June 25, 1930. No action was begun until the husband filed a petition September 24, 1930. September 30, pursuant to a letter from appellants, the clerk of the court entered on the record appellants' appearance as attorneys for defendant. No pleading on behalf of their client was ever filed by them. Five days later the wife notified appellants that she had concluded to hire other attorneys. Later such other attorneys filed on behalf of the wife a motion to the petition and an application for allowance *pendente lite*. On this application the wife was allowed alimony and fees for her then attorneys by an order entered January 10, 1931. April 12, 1931, appellants filed their own application for fees. It was this application which, on motion of plaintiff's attorneys, was stricken.

Appellants claim to have rendered legal services to defendant from June 25, 1930, to October 5, 1930. The services are stated to have been in preparing for an action for divorce and alimony to be brought by the wife, in preparing to defend a threatened action if and when brought by the husband, and preparing all such litigation incidental to disposition of property rights valued at $500,000. Appellants claim various members of their firm spent 43 days' time in this work. Though offered to the wife, no use of the fruits of their labors was ever made. She paid them $100. They ask for $1,700 more from the husband.

Do these facts entitle appellants to fees from the husband? By the weight of authority the law recognizes no right to bind a husband to pay fees to a wife's attorney in the absence of a contract with him or a statute creating such right. 25 A. L. R. 354; 42 A. L. R. 315. The Nebraska statute creates such right, but the allowance is to the wife to enable her "to carry on or defend the suit during its pendency." Comp. St. 1929, sec. 42-308. The

husband is not liable directly to the attorney for any services rendered. *Zent v. Sullivan,* 47 Wash. 315, 13 L. R. A. n. s. 244; *Yeiser v. Lowe,* 50 Neb. 310; *Burnham v. Tizard,* 31 Neb. 781. The allowance is only for the purpose expressed. If the wife has property of her own so that without such allowance this purpose can be accomplished, the reason and necessity for this allowance disappears, and, ordinarily, in that event she must look to her own purse to pay her attorney. *Wilkins v. Wilkins,* 84 Neb. 206. She may, however, contract and bind herself to pay fees. *Tyler v. Winder,* 89 Neb. 409. But the marriage relationship does not create an agency by which her husband can be bound. It is upon the wife's request that an allowance is considered. We find no authority under our law to compel the husband to pay fees to an attorney on the attorney's own application. The right created for the wife's benefit being statutory, decisions from other jurisdictions having different statutes are of no value.

Here the wife has made no application for allowance to these attorneys, nor on her behalf have these attorneys set the wheels of justice in operation for her. If the processes of the court had for her been set in motion by them, a definite interest in the suit would have been established and no action of the wife would then have deprived the attorneys of a hearing for fees on an application which she may have made. *Kiddle v. Kiddle,* 90 Neb. 248. We take it as essential that some pleading or application by the wife must first be filed before the court can be justified in entertaining allowances for her counsel. Our statute gives a married woman independent rights. Comp. St. 1929, sec. 42-202. She may choose as counsel whom she will, and the burden of fees is her own concern; it does not become the concern of the husband without the intervention of the court and then only upon her application for the purpose of enabling her "to carry on or defend the suit during its pendency." Neither such application nor purpose is shown in the record. On the other hand, the wife has attached no value to appellants' work; it has not

enabled the wife to carry on or defend the suit. Appellants probably well performed the tasks at which they were set by the wife and for this she may be personally liable, but if she decides to reject the results before the court is called upon to act for her the husband is not bound. Furthermore, it may well be doubted whether any allowance could properly be considered for such services as appellants claim to have performed preceding the beginning of the suit (19 C. J. 233), but this we are not called upon to decide. Under the circumstances the motion to strike the appellants' application for fees was properly sustained.

The appellants further claim that the court could not sustain the motion to strike appellants' application for fees, because they had already entered their appearance as attorneys for the defendant, and as a consequence thereof they were presumed under the law to be acting for her; and that because of this presumption the burden was upon the one who asserted the contrary to establish that fact by evidence, citing as authority *Curtice Co. v. Estate of Jones*, 111 Neb. 166; *Jordan v. Evans*, 99 Neb. 666; and *In re Gasser*, 104 Fed. 537. The rule is correct, and, strictly as a legal proposition, if the record had been devoid of other facts the trial court may have consistently overruled the motion. However, such presumption disappears when evidence on the subject appears, and appellants' own showing is that no pleading or application was filed on their client's behalf, and that they were discharged by her on October 5, 1930; and the record further shows that other attorneys acted for her, performed services, filed a pleading and an application, and that on such application the court made an allowance for alimony and fees. When the record shows facts to the contrary, such presumption has no application. *First Nat. Bank of Elgin v. Adams*, 82 Neb. 801; *Eggeling v. Chicago, R. I. & P. R. Co.*, 119 Neb. 229; *Lincoln v. French*, 105 U. S. 614; *Peters v. Lohr*, 24 S. Dak. 605, 609; 22 C. J. 124; 1 Elliott, Evidence, secs. 91-93; 5 Wigmore, Evidence (2d ed.) secs. 2490, 2491.

Thus the merits of the controversy were properly before the court on a motion to strike.

The action of the trial court in striking appellants' application from the files is correct and is

AFFIRMED.

G. A. ERICSON, APPELLEE, V. MUTUAL BENEFIT HEALTH & ACCIDENT COMPANY, APPELLANT.

FILED FEBRUARY 19, 1932. No. 28111.

Insurance: NOTICE OF LOSS: WAIVER. When an insurance company which has timely notice of a claim or loss is sued upon an alleged claim and denies liability, it waives proof of loss.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Cleary, Horan & Skutt, for appellant.

Ritchie, Swenson & Arey, contra.

Heard before ROSE, DEAN, GOOD and DAY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This is an action by the beneficiary to recover the benefits under a policy of health and accident insurance. The insurer seeks to avoid liability for payment of the death benefit on account of the failure of the beneficiary to furnish formal proofs of loss within the time provided by the terms of the policy. At the close of the plaintiff's testimony, the defendant moved for a directed verdict. The motion was overruled and the defendant elected to stand on the motion. The plaintiff thereupon moved the court to direct a verdict in his favor, which was done, and from a judgment on said verdict the insurance company appeals.

It is the contention of the plaintiff that the insured was injured October 7 and that as a result of said injury he died about two weeks later. At the time of the injury deceased was employed in a lumber camp near West Yellow-

stone, Montana. He was taken to Rexburg, Idaho, for hospitilization on October 8. On October 11, his doctor, at the request of the insured, notified the insurance company. On October 20, the same doctor notified the insurance company that insured died that day. This seems to be sufficient notice under the policy. The policy provides that the company will furnish proof blanks to the beneficiary, which was never done. The accident occurred in a lumber camp near West Yellowstone, Montana. The insured died in a hospital in Rexburg, Idaho. He was employed by the Globe Lumber Company, the office of which is in Salt Lake City, Utah. The beneficiary lived in Sweden, a foreign country, thousands of miles away, and was notified by the doctor of his son's death. The distances involved in this case are impressive.

The principal contention of the defendant is that the proofs of loss were not filed within the time provided by the policy. The question presented is whether the proofs of loss were waived by the company. The petition of the plaintiff alleges that the insured died as a result of an accident; that he gave prompt notice to the insurance company of the fact; and that the insurance company waived the proof of loss. The answer admits the issuance of the policy, but denies each and every allegation of the petition. This was a denial of all liability under the policy. This case is clearly within the rule announced in *Western Travelers Accident Ass'n v. Tomson*, 72 Neb. 661; 72 Neb. 674; 72 Neb. 680. This court approved the rule in *Tomson v. Iowa State Traveling Men's Ass'n*, 88 Neb. 399. See, also, *Hilmer v. Western Travelers Accident Ass'n*, 86 Neb. 285. The rule is that when an insurance company which has timely notice of a claim or loss is sued upon an alleged claim and denies liability, it waives proof of loss. The judgment of the district court should be approved.

This case has been vigorously contested by the defendant. It has been necessary to take depositions in widely separated places—Santa Monica, California, Rexburg, Idaho, and Sweden. The plaintiff's attorneys were required

to and did perform an unusual amount of work in this case. This was necessitated by the resistance of the company to the claim. The trial court allowed a fee of $300. The amount of the judgment was approximately $2,342.44. There is no uniform holding of this court to the effect that attorney's fees will not exceed a certain percentage of the recovery, but each case is considered upon its merits. The record in this case is before the court and is the best evidence to support a motion for an attorney's fee. The plaintiff's attorneys are allowed as fees in this court the sum of $350, in addition to the fees allowed by the trial court.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. STATE BANK OF TOUHY: E. H. LUIKHART, RECEIVER, APPELLEE: FRANK J. ZETOCHA, INTERVENER, APPELLANT.

FILED FEBRUARY 19, 1932. No. 28179.

Banks and Banking: INSOLVENCY: TRUST FUNDS. Converted proceeds of a check delivered to and received by a bank for the sole purpose of paying a specific debt of the payee *held* trust funds payable in full from bank assets in the hands of the receiver, and not deposits.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Reversed, with directions.*

Julius J. Zitnik, for appellant.

F. C. Radke, Barlow Nye and *M. Craft Radke, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

ROSE, J.

In a proceeding in the district court for Saunders county to wind up the affairs of the State Bank of Touhy, an insolvent banking corporation, Frank J. Zetocha, intervener and claimant, presented a petition for the allowance of

$4,305.78 as a preferred claim for a trust fund payable in full out of the general mass of assets in the hands of the receiver. The trial court found that the proceeds of the check were not trust funds but deposits entitling claimant to share bank assets as a depositor. From a judgment based on that finding intervener appealed.

The question presented by the appeal is the validity of the claim for a trust fund. The material facts are not in dispute. The claim arose in the following manner: Claimant owed the Prudential Insurance Company a debt of $4,305.78. To make payment he borrowed that amount, received from the lender a check therefor, turned the check over to the bank and directed the officer in charge to remit the money to the Prudential Insurance Company's agent at Fargo, North Dakota. The check in possession of the bank was the equivalent of money, which it used for its own benefit, without making the remittance directed by claimant. Later the bank went into the hands of a receiver.

The receiver takes the position that the check was deposited by claimant and relies on evidence that it was so entered on the bank records; that claimant had a checking account in the bank; that he accepted a duplicate deposit slip therefor.

It is a stipulated fact that claimant instructed the officer in charge of the bank to remit the $4,305.78 to the agent of the Prudential Insurance Company at Fargo. Claimant used the check for the sole purpose of paying his debt by bank remittance. What the banker entered on the books and on the so called "deposit slip" to the contrary was the work of the bank and did not record the consent of claimant to a deposit. If the amount of the check was a mere credit on the checking account of claimant, the bank could not have used the funds for the remittance directed by him without his personal check, which was never drawn. What was called a "deposit slip" amounted to no more than a receipt for the check delivered to the bank for the sole purpose of providing the means for the re-

mittance ordered. The bank received the check as a trustee, converted the proceeds, used them for banking purposes, and is accountable as trustee. The proceeds constituted trust funds which belonged to claimant pending the execution of the trust—an unperformed duty of the trustee. The trust funds never became the property of the bank and are not assets distributable to depositors. The ruling on intervener's claim is controlled by the opinion in *State v. Farmers State Bank*, 121 Neb. 532.

The judgment of the district court is reversed and the cause remanded for a decree directing the receiver to pay intervener's claim in full out of assets of the bank.

REVERSED AND REMANDED FOR SPECIFIC DECREE.

PAINE, J., concurs in the result.

GOOD and EBERLY, JJ., dissent.

IN RE ESTATE OF BRUNO SCHELLENBERG. FRANK J. DUFACK, APPELLANT, V. ESTATE OF SCHELLENBERG, APPELLEE.

FILED FEBRUARY 19, 1932. No. 28167.

Sales: BREACH OF WARRANTY: WITNESSES: COMPETENCY: COMMUNICATIONS WITH DECEASED PERSONS. When a purchaser of certain corporate stock seeks to recover the purchase price of such stock from the estate of the former owner thereof, since deceased, on the ground of a breach of warranty, such purchaser is precluded, under section 20-1202, Comp. St. 1929, from testifying in respect of representations made to him in respect of such stock by the decedent.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Willard E. Stewart, for appellant.

W. C. Parriott, contra.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY, DAY and PAINE, JJ.

DEAN, J.

Frank J. Dufack filed a claim in the county court of Lancaster county against the estate of Bruno Schellenberg to recover $275, that being the purchase price of five shares of stock in the Western Paint & Glass Company which was owned by Schellenberg and from whom the plaintiff purchased the stock January 25, 1928. Plaintiff contends that there was a breach of implied warranty and a failure of consideration in the stock so sold to him. From an order of the county court disallowing his claim, the plaintiff appealed to the district court, where the judgment was affirmed. He now appeals to this court.

A stipulation discloses the following facts. On July 21, 1925, the voting power of the above named company was given to a representative of one of its creditors who operated the business for the benefit of other of the creditors. On May 1, 1928, the entire assets of the company were placed under the control of a committee of the company's creditors to liquidate its affairs. At a later date the assets of the company were sold, but it appears that the stockholders received no part of the proceeds of such sale. The plaintiff testified that, when he purchased the stock, he understood it was of the par value of $500 for the five shares and that he did not know that the company was then under the control of its creditors. No other testimony than that submitted by the plaintiff appears in the record.

The plaintiff cites and relies on section 69-436, Comp. St. 1929. This section, however, is a part of the uniform sales act and refers to an implied warranty as relating to documents of title in the sale of goods and the like, and it does not appear to be applicable to the facts involved herein. And it may be noted that no fraud was alleged by the plaintiff in the sale of the stock to him.

Section 20-1202, Comp. St. 1929, provides:

"No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had be-

tween the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation."

We conclude that when a purchaser of certain corporate stock seeks to recover the purchase price thereof from the estate of the former owner thereof, since deceased, on the ground of a breach of warranty, such purchaser is precluded, under section 20-1202, Comp. St. 1929, from testifying in respect of representations made to him in respect of such stock by the decedent.

Reversible error does not appear herein. The judgment is

AFFIRMED.

ANCIENT AND ACCEPTED SCOTTISH RITE OF FREEMASONRY, APPELLANT, V. BOARD OF COUNTY COMMISSIONERS, APPELLEE. CONSOLIDATED IN DISTRICT COURT WITH ANCIENT AND ACCEPTED SCOTTISH RITE OF FREEMASONRY, APPELLANT, V. BOARD OF EQUALIZATION OF LANCASTER COUNTY, APPELLEE.

FILED FEBRUARY 19, 1932. No. 27568.

1. **Taxation**: EXEMPTIONS. Under the evidence in this case, the property of the Ancient and Accepted Scottish Rite of Freemasonry of Lincoln, to wit, the Scottish Rite Temple, and lots 7, 8, and 9, of block 92, of the original plat of Lincoln, Lancaster county, Nebraska, on which the same is situated, is not subject to taxation for the years 1926, 1927, 1928, and 1929.
2. **Cases Overruled.** *Scottish Rite Building Co. v. Lancaster County*, 106 Neb. 95, and *Mt. Moriah Lodge, A. F. & A. M., v. Otoe County*, 101 Neb. 274, in so far as conflicting with this opinion, overruled.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Reversed, with directions.*

Peterson & Devoe, for appellant.

Max G. Towle and *Farley Young, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

EBERLY, J.

In complaints before the board of county commissioners and the board of equalization of Lancaster county, the Ancient and Accepted Scottish Rite of Freemasonry of Lincoln, complainant, prayed for an order striking from the tax lists for 1929 the real estate consisting of the Scottish Rite Temple and grounds at the northeast corner of Fifteenth and L streets in the city of Lincoln, on the statutory ground that the property described is exempt from taxation, for the reason that it is used exclusively for educational, religious or charitable purposes, and not for financial gain or profit to either the owner or user. Comp. St. 1929, sec. 77-202. The legal title to the real estate is held by the Scottish Rite Building Company and in that name the property was entered on the tax lists in 1926 at the assessed valuation of $110,000 and will remain thereon for the year 1929, unless stricken off. The equitable or beneficial owner is alleged to be the Ancient and Accepted Scottish Rite of Freemasonry, the legal title being held for convenience in the name of the Scottish Rite Building Company. The county board dismissed the complaints and allowed the property to remain on the tax lists for the purposes of taxation. Complainant appealed from the decision of the county board to the district court, where the alleged facts upon which the claims for exemption are based were put in issue by formal pleadings. Upon a trial the district court found that the Scottish Rite Temple and grounds were not used exclusively for religious, charitable or educational purposes within the meaning of the constitutional and statutory provisions re-

lating to exemption of property from taxation, refused to strike the property from the tax lists, and dismissed the complaints. From the judgment of the district court complainant appealed to the supreme court.

The question presented by the appeal is the asserted right of complainant to a decree in equity striking from the tax lists the Scottish Rite Temple and grounds as property exempt from taxation under the following constitutional and statutory provisions:

"The legislature by general law may exempt property owned by and used exclusively for agricultural and horticultural societies, and property owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user." Const. art. VIII, sec. 2.

"The following property shall be exempt from taxes: * * * Property owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user." Comp. St. 1929, sec. 77-202.

The evidence discloses that the appellant is a subordinate body to the Supreme Council of the Ancient and Accepted Scottish Rite of Freemasonry of the Southern Jurisdiction of the United States of America, the governing organization, and is a part of the general masonic structure; that the foundation or Blue Lodge of masonry has three degrees; that appellant confers the degrees from fourth to thirty-second inclusive. Another branch of masonry exists in the York Rite, commonly understood as Knight Templarism, which confers degrees peculiar to itself. The Scottish Rite Building Company is a Nebraska corporation, and holds title to the property here in suit for the sole use and benefit of appellant as representative of the subordinate bodies of the Valley of Lincoln, and has no power to devise or dispose of the same without the consent of the members of appellant organization and of the supreme authority governing subordinate bodies. The ap-

pellant, as a practical matter, exercises full and complete control of the property in controversy, which consists of a building of stone and brick construction covering about 100 feet by 142 feet of ground. This building contains general office quarters used solely for the administration of the order's affairs, a reception room or parlor, a lobby, a small and also a large lodge room, a banquet hall, together with paraphernalia rooms, music room, rooms for storage and for coal and heating apparatus. It is ordinarily referred to as the Temple and will so be hereinafter designated. It also appears that no portion of this Temple building is ever used for commercial purposes, but is devoted exclusively to the furtherance of the purposes of masonry. It is built with special reference to requirements of the work carried on by the Scottish Rite bodies, and is, with its appointments, absolutely necessary to the efficient and appropriate accomplishment of their purposes. In it is conferred the Scottish Rite degrees from the fourth to the thirty-second, and there is also held therein the business meetings of the included Scottish Rite masonic bodies. It is also used without charge by the Order of De Molay, which may be said to be approved, sponsored, and promoted by appellant, and having as its purpose, in part, the training of young men and boys for a better life, and which will tend to qualify them later to meet the requirements of masonry. It is also used by the Order of the Nobles of the Mystic Shrine (a masonic order), to whom none but Scottish Rite masons of the thirty-second degree and Knights Templars are eligible, for their business meetings and their biennial ceremonial sessions. The Shrine band maintained by this last named organization use it as their place of instruction and practice. The Temple building is also used by the Order of the Eastern Star, without financial remuneration, for their lodge purposes. This order may be said to be in the nature of an auxilliary masonic organization. Excepting the Shrine band, these societies are all ordinarily known as secret orders, and the only affairs carried on therein pertain or

are incidental to their lodge work. Educational and charitable activities and purposes are common, in fact identical, in both craft masonry and that of Scottish Rite, and to that extent they work together.

It is also unquestioned in the record that the Temple property is not owned or used for financial gain of either the owners or users, or of the individuals of the membership comprising the same.

The appellant, considered as a "lodge," is supported, maintained and carries on its work wholly out of the initiation fees, annual dues paid in by its membership, and voluntary contributions by them made. But membership as such, it appears from the evidence, is not the source of any financial return to the member.

A certain portion of the funds so received are, however, remitted to the Supreme Council, the parent body already mentioned. Indeed, the co-ordinated bodies of the Supreme Council, of whom the appellant is one, are the money gatherers of that body, and, excluding devises and other incidental contributions, are the sole and ultimate source of the funds distributed by that supreme organization. A summary of these expenditures comparatively recently made discloses not only the extent of this work on the part of the "co-ordinated bodies," but also the purposes to which the proceeds of the same were largely devoted by the Supreme Council, and is as follows: Paid directly for educational purposes $1,285,413.22 (including one million dollars to George Washington University, Washington, D. C.); for maintenance of hospitals $205,125.76; for masonic and other charities $307,779.22; for charitable relief $165,740; for disasters, floods, fires, wherever occurring, $111,565.09. The total of contributions so made to strictly educational and charitable purposes aggregates $6,318,016.15.

As to the portion of appellant's income not thus employed, it may be said that within the local orders, and as an instrumentality thereof, there is an organization known as the Scottish Rite Educational Welfare Association, separately incorporated, to which contributions are

made by appellant, the sole object and purpose of which is to assist worthy students in the completion of their education. This instrumentality now has at its disposal $60,000, all of which at the time of the hearing of this case in the district court, save and except the sum of $13,500, was in active use for the purposes supplied. There is also another subsidiary organization known as the Scottish Rite Relief Board, now possessing a balance of approximately $15,000 contributed by the appellant's membership, devoted wholly to charitable relief. All revenues received by appellant not used for maintenance of its building and defraying necessary costs and legitimate expenses in the administration of the Order's affairs are placed in a fund to be used when called for or required for educational and charitable purposes. In addition, there is a system of voluntary charitable contributions provided for, made by the membership in addition to regular and stated dues. Then, too, the evidence discloses without dispute that its charities are not limited to the membership of the Order, but extend to worthy objects without reference to their institutional affiliations.

If it be said that the matter of determining the precise and essential nature of the use of the Temple property by appellant as a lodge or fraternal society, excluding from consideration such portion of such use so far as the same pertains to the creation and perpetuation and administration of the charities enumerated, still remains to be accomplished, the answer is to be found in undisputed evidence submitted in this case. An epitome of the record on this point would include the following facts: (The term "masonry" as employed by the witnesses pertains to and embraces the work of appellant considered as a lodge or fraternal secret society.) Masonry is traditionally and generally described as a system of morality veiled in allegory and illustrated by symbols. It teaches as a foundation principle faith in God and immortality of the soul. Masonry is not sectarian in its religious teaching. It aims to bring its devotees a deeper and more conscious

contact with spiritual things. To the extent that religious purposes include the field of morals, masonry makes common cause with organized religion. Masonry is tolerant of all faiths and builds a moral and spiritual fellowship on the foundations of fundamental morality common to them. It brings its members to the altar of prayer, and by its every teaching and effort seeks to make real the invisible power of love, the intrinsic worth of harmony, and the beauty and eternal reality of the ideal. Outside of the activity of masonry which is devoted to charity, which constitutes a very substantial and major part of its endeavors, all of its activities in all of its bodies are devoted to those purposes which properly fall within the definition of "educational" and "religious." The positive testimony based upon the positive knowledge of the witnesses testifying in summarizing is that, measured by its purpose as exemplified by appellant, and as applied in its work as a lodge or society (to quote from the record before us), "Masonry falls entirely, without exception, within the three catagories of charity, educational purpose, and religious purpose. It has no other function or purpose and does no other work." Further, that the statements thus made "may be fully verified in every particular by reference to a large body of masonic literature available to any one who is interested in studying it, open to everybody, representing the best masonic thought for centuries back in time."

It further appears that these results are accomplished by and through the teachings of its rituals as employed in the conferring of its degrees, and in the transaction of its business, as well as by its literature.

On this evidence the trial court, in effect, held that a "religious purpose," within the meaning of the statutory and constitutional provisions involved in this case, requires an organization whose primary purpose is a sectarian organization holding open meetings, open to the public, and teaching a faith and belief in some particular or special doctrine of faith of some kind, as distinguished from other

accepted religious faiths; and that as the property was not used "exclusively for a religious purpose," as thus restricted, and by an owner identified with a class thus described, it was not subject to exemption, and as it was not used exclusively for charitable purposes it could not be exempted on that ground. In the disposition of appellant's claim based on the alleged use of the property for "educational purposes," the court, in effect, determined, in the light of *Young Men's Christian Ass'n v. Lancaster County,* 106 Neb. 105, that the building must be used for scholastic purposes, a "school." And appellant's property, not being devoted exclusively to a purpose within the judicial definition thus announced, was for this reason not subject to the exemption claimed.

It is to be observed that the case last referred to involved taxes assessed in 1917 and 1918, and a claim of exemption based in part on the words "school purposes," as those words were used in the statutes and Constitution then in force. Conceding that "school" is a generic term, and denotes an institution for instruction or education, a collective body of pupils in any place of instruction under the direction of one or more instructors (35 Cyc. 811), still the decision relied on, as to the present question, is wholly devoid of the force of precedent in the instant case. By constitutional amendment effective January 1, 1921, followed by a statutory amendment, the word "school" was eliminated and the word "educational" substituted therefor in both Constitution and statute controlling. Therefore the question of educational purposes was not, and could not have been, presented and decided in *Young Men's Christian Ass'n v. Lancaster County,* 106 Neb. 105. Furthermore, lexicographers and the courts agree in defining "educational" as pertaining to "education." The latter word taken in its full sense is a broad, comprehensive term and may be particularly directed to either mental, moral or physical faculties, but in its broadest and best sense it embraces them all, and includes not merely the instructions received at school, college, or university,

but the whole course of training—moral, intellectual, and physical.

An educational purpose is synonymous with an educational undertaking, and whatever educates is within the meaning of an "educational undertaking." 19 C. J. 1015; *Conley v. Daughters of the Republic*, 106 Tex. 80.

It would seem also to follow that if the achievements of this Order are dependent upon, or are in fact due to, instruction and training received by its initiates and membership, directed either to their mental or moral faculties, and in which the Temple is employed, to the extent of such use an educational purpose would be involved.

It would seem also a serious question is involved in the view announced by the trial court, in effect that the term "religious purpose" requires as a prerequisite to its application a society, approximating a sectarian organization, formed and maintained exclusively for religious purposes and using the property claimed as exempt, in the conduct of open meetings devoted to teaching a belief in some particular or special doctrine of faith, after the manner of the sectarian churches of the present day.

It is to be noted that the controlling language determines the exempt character of property solely by the "purpose" to which it is devoted. The identity and character of the owner is not in express terms constituted an element of the right involved nor made a prerequisite to its exercise.

Indeed, the pronouncement of the trial court appears wholly incompatible with the spirit of section 1, art. I of the Constitution; to the conceded "natural and indefeasible right" of the citizen "to worship Almighty God, according to the dictates of his own conscience;" as well as being a clear transgression of the constitutional inhibition which directs that "no preference shall be given by law to any religious society." Const. art. I, sec. 4.

"Religious purpose" is indeed synonymous with "religious worship," though of wider scope. On this subject a court of high standing has said: "Prayer is always worship. Reading the Bible and singing may be worship.

* * * If these exercises of reading the Bible, joining in prayer and in the singing of hymns were performed in a church there would be no doubt of their religious character, and that character is not changed by the place of their performance." *People v. Board of Education,* 245 Ill. 334, 339. See *State v. Scheve,* 65 Neb. 853.

The conclusion follows that neither the profession of a sectarian creed, nor the formal dedication or occupation of property to promote the objects and purposes of a faith thus expressed, is an essential element of a "religious use," nor a necessary prerequisite to and of an "exclusive religious purpose."

The question of primary importance in this case, upon which all others must depend, is to determine what "uses" and "purposes" are exclusively "educational," "religious," and "charitable," as these terms are employed in the Constitution and statutes here applicable. In both it will be noted that connecting the terms "educational," "religious," and "charitable," the conjunction "or" is employed or implied. So used, "or" may be construed to mean "and" when necessary to make the statute express the true legislative intent; and similarly "or" may be construed as meaning "and" in constitutional provisions. 46 C. J. 1127; 2 Lewis' Sutherland, Statutory Construction (2d ed.) 756; 25 R. C. L. 977, sec. 226. Therefore, in the instant case, in view of the general purpose to be promoted, it may not be said that the right of exemption is dependent on the fact that the property involved was used for purposes exclusively educational, or exclusively religious, or exclusively charitable, construing the three conditions to be distinct and mutually exclusive. Reason would dictate that, if property is in fact used for no other purposes than those which are educational, religious, and charitable, it is plain that the conditions of the exemption have been strictly complied with, irrespective as to the matter of proportion which any one of these distinctive purposes may bear to the others.

It is also to be noted that our constitutional provision

and the statute passed pursuant thereto evidence a development. At the organization of the state, tax exemptions were not made a matter of constitutional regulation. They were first created and defined by the adoption by the territorial legislature of Nebraska of 1857, "of the thirty-seventh chapter of the Code of Iowa, entitled Revenue." This enactment provided in substance that the following should be exempt from taxation: "The grounds and buildings of library, scientific, benevolent and religious institutions or societies devoted solely to the appropriate objects of these institutions (within limits specified). * * * The books, papers, furniture, scientific, or other apparatus pertaining to the above institutions," and "money and credits belonging exclusively to such institutions, and devoted solely to sustaining them." Laws 1857, p. 147. Section 1, art. XI of the Constitution of 1866, continued this legislation "in force until altered, amended, or repealed by the legislature." And this enactment, as amended, still being in force at the time of the adoption of the Constitution of 1875, was further continued by the effect of section 1, art. XVIII thereof, in terms providing "that all laws in force at the time of the adoption of this Constitution, not inconsistent therewith, and all rights * * * of this state, individuals, or bodies corporate, shall continue and be as valid as if this Constitution had not been adopted." In this connection it will also be remembered that in 1873 there was duly enacted "An act for the incorporation of charitable societies," providing for their organization and incorporation "for any charitable purpose," and defining the "charitable purposes" to which their powers might be applied. This was also continued in force and effect by the constitutional provisions last referred to, and, as now amended, provides: "Charitable societies within the meaning of this chapter shall be construed to include only societies intended to assist those suffering from any disease, infirmity or necessity, and societies for the prevention of cruelty to children and animals and for their protection and for other humanitarian or benevolent purposes."

Comp. St. 1929, sec. 24-601. So, also, since 1907 the legislature has provided for the incorporation of "All state, grand, supreme or national, secret, fraternal, benevolent or charitable orders, lodges," etc., and their respective subordinate bodies, without any precise definition of the terms "benevolent" and "charitable," etc., as employed in this act, but expressly including the following: "The Grand Lodge, Ancient Free and Accepted Masons; The Grand Chapter of the Order of the Eastern Star, of the State of Nebraska," etc. Comp. St. 1929, sec. 24-607.

It is to be observed that the terms of the exemption statute and the constitutional restriction as between the incorporated "charitable society" organized under the laws of 1873, as amended, and the benevolent or charitable order or lodge incorporated under the laws of 1907, as amended, are strictly impartial, and both are placed upon a plane of absolute equality. As to each the test for tax exemption prescribed was, and is, that the "property" be "owned and used exclusively for educational, religious, charitable or cemetery purposes," and "not owned or used for financial gain or profit to either the owner or user." Though these terms are undefined, by context their meaning is identical as applied to the two classes of corporations.

When the legislature later defined "charitable purposes," as employed in the act of 1873, as including assistance to "those suffering from any disease, infirmity or necessity, * * * and for other humanitarian or benevolent purposes," it necessarily became a legislative construction to the extent expressed (but not exclusive, however) of the identical words as applied to the incorporated charitable order or lodge. This conclusion is in accord with the usual and accepted canons of statutory interpretation.

In the construction of the controlling statute in this case it must be remembered that "No single statute should be interpreted solely by its own words. Upon enactment it becomes a part of, and is to be read in connection with, the whole body of the law. Its interpretation is to be

in the light of the general policy of previous legislation and of the long-established principles of law and equity. * * * Even statutes on cognate subjects, though not strictly *in pari materia*, may be referred to, in order to elucidate the intention of the legislature in enacting any given statute." 25 R. C. L. 1052, sec. 277.

Indeed, this jurisdiction is committed to the doctrine that, in a case where the proper interpretation of the statutory terms is involved, in order to ascertain the proper meaning of a statute, later as well as earlier legislation upon the same subject may be referred to. All existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one. *Campbell v. Youngson*, 80 Neb. 322; 36 Cyc. 1142.

And so, while it is a well-settled general rule that exemptions from taxation are to be strictly construed, and their operation is never to be extended by construction, the power and the right of the state to tax are always presumed, and the exemption must be clearly granted. This does not mean that there should not be a liberal construction of the language used in order to carry out the expressed intention of the fundamental lawmakers and the legislature, but, rather, that the property which is claimed to be exempt must come clearly within the provisions granting such exemption. 25 R. C. L. 1093, sec. 309; *Y. M. C. A. of Omaha v. Douglas County*, 60 Neb. 642; *House of the Good Shepherd v. Board of Equalization*, 113 Neb. 489; *Young Men's Christian Ass'n v. Lancaster County*, 106 Neb. 105.

In determining the legislative intent evidenced by the term "charitable purposes," as employed in, but not defined by, the constitutional and statutory provisions quoted, "in the light of the long-established principles of law and equity," we inescapably recur to the "Statute of Charitable Uses" (43 Eliz. cap. 4) enacted by the parliament of England in 1601, in part in the following language:

"Whereas lands, tenements, rents, annuities, profits,

hereditaments, goods, chattels, money and stocks of money have been heretofore given, limited, appointed and assigned, as well by the Queen's most excellent majesty, and her most noble progenitors, as by sundry other well-disposed persons; some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, sea-banks and highways, some for education and preferment of orphans, some for or towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsmen and persons decayed, and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes; which lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money, nevertheless have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver and employ the same: (2) for redress and remedy whereof, be it enacted by authority of this present parliament."

And as further evidencing the approved and ancient legislative employment of the term "charitable purposes," chapter 79, part V, 39 Geo. III, an act for the suppression of certain societies, expressly excludes lodges of freemasons from the sanctions thereof for reasons therein stated, as follows: "Whereas certain societies have been long accustomed to be holden in this kingdom under the denomination of lodges of freemasons, the meetings whereof have been in great measure directed to charitable purposes," etc.

True, the statute of 43 Elizabeth quoted created no new law on the subject of charitable uses, but merely provided a new and ancillary jurisdiction for their enforcement, which in due time, in England in fact, was largely super-

seded by an equitable procedure on information by the attorney general (3 Story, Equity Jurisprudence [14th ed.] sec. 1536), and ultimately repealed in 1908; and while its provisions for the administration of charitable uses are not now, and never have been, in force in this jurisdiction (*St. James Orphan Asylum v. Shelby*, 60 Neb. 796; *In re Estate of Nilson*, 81 Neb. 809) still it remains historically true that the preamble of the statute of Elizabeth quoted contains an accurate, though incomplete, enumeration of charitable objects or purposes recognized as such by the courts of equity of the English speaking nations, not only of that time, but during the years that have since intervened. It must, however, be admitted that "This list omits some most important and familiar charitable objects. * * * The English and American courts have never regarded this enumeration as exhaustive, but as designed to be merely illustrative. * * * The doctrine is settled that all particular objects embraced within the general spirit, intent, and scope of the statute are to be considered as charitable, unless they violate some rule of public policy or the provisions of some positive statute." 3 Pomeroy, Equity Jurisprudence (4th ed.) sec. 1020. "Numerous trusts for purposes of benevolence are upheld as charitable, although not mentioned in the statute, since they are within its spirit and intent." 3 Pomeroy, Equity Jurisprudence (4th ed.) sec. 1022. So, too, "gifts, devises, and bequests in trust for educational purposes are valid, since they are all clearly within the spirit of the statute." 3 Pomeroy, Equity Jurisprudence (4th ed.) sec. 1023.

In view of the import accorded the words "charitable purposes" since time immemorial, as evidenced by the ancient statutes, and as recognized, approved and applied by the general principles of equity, as well as the use, definition and employment thereof by our own legislature, we are constrained to the view that the words descriptive of the purposes which the controlling statute exempts must be construed not in their restrictive, but in their comprehensive, sense. So construed, the activities of appellant

fairly fall within the tax exemption provisions of our statute and Constitution.

In addition, it may be said that outside of this jurisdiction the courts of this country, proceeding "in the light of the long-established principles of law and equity," have, even before the adoption of our Constitution of 1875, almost universally recognized the benevolent and charitable purposes of Freemasonry, and adjudged it to be a charitable institution. *King v. Parker,* 9 Cush. (Mass.) 71; *Burdine v. Grand Lodge of Alabama,* 37 Ala. 478; *City of Indianapolis v. Grand Master, etc.,* 25 Ind. 518; *State v. Addison,* 2 S. Car. 499; *Mayor v. Solomon's Lodge, etc.,* 53 Ga. 93; *State v. Board of Assessors,* 34 La. Ann. 574. See, also, *Mayor v. Grand Lodge,* 60 Md. 280; *Morris v. Lone Star Chapter,* 68 Tex. 698; *City of Philadelphia v. Masonic Home of Pennsylvania,* 160 Pa. St. 572; *Fitterer v. Crawford,* 157 Mo. 51.

It appears, however, that under constitutional provisions restricting exemptions from taxation to "public charities" the following courts have held that masonic bodies that restricted their charity to their own were private as distinct from a "public charity," and therefore not exempt. *Bangor v. Masonic Lodge,* 73 Me. 428; *Morning Star Lodge v. Hayslip,* 23 Ohio St. 144; *City of Newport v. Masonic Temple Ass'n,* 108 Ky. 333; *Vogt v. City of Louisville,* 173 Ky. 119.

However, this court, in *Plattsmouth Lodge v. Cass County,* 79 Neb. 463, as opposed to the reasoning of the cases last above cited, held, under circumstances similar to those here set forth, that the property thus used was for a charitable purpose and exempt.

So, too, section 2, art. VIII of the Nebraska Constitution of 1875, as originally adopted, was exactly as heretofore quoted herein, except that, in lieu of the word "educational," the word "school" appears. As a matter of history it was adopted from the Illinois Constitution of 1870, and constitutes a verbatim copy of the tax exemption clause (section 3, art. IX) of that instrument. It will be

noted that the word "public" forms no part of this section, nor of the laws of this state enacted for carrying the same into effect. It will also be remembered that in the act of 1877, which was passed for carrying into effect the language of this constitutional provision, the legislature used the exact language of the Constitution. Also, when the constitutional amendment of 1920 of this section was adopted, the succeeding legislature immediately, by amendment to the existing revenue law, likewise employed the exact language of the Constitution as amended. This fact not only necessitates but accentuates the conclusion that the plain legislative intent, fairly expressed, is to exempt from taxation all property that the Constitution as now amended permitted them to exempt.

In the case of *Grand Lodge v. Board of Review*, 281 Ill. 480, the supreme court of that state had occasion to pass upon "what constitutes a 'public charity.'" While it appears that the constitutional provision of the state of Illinois relating to tax exemptions was at that time identical with the one later adopted by Nebraska, the statute passed by the legislature of Illinois pursuant thereto differed from the one before us, enacted by Nebraska, in that, as will be seen from the following quotation, the word "public" was employed therein. The discussion of the Illinois court on this branch of the case is as follows:

"The seventh clause of section 2 of the 'Act for the assessment of property and for the levy and collection of taxes,' as amended in 1915, exempts from taxation 'all property of institutions of public charity, * * * when such property is actually and exclusively used for such charitable or beneficent purposes, and not leased or otherwise used with a view to profit.' Laws 1915, p. 576. It has been quite uniformly held by the courts that the primary objects of a Masonic lodge being benevolence and charity, such a lodge is a charitable institution. *Morrow v. Smith*, 145 Ia. 514; Ann. Cas. 1912A, 1183, and note. That the Masonic Home is a charitable institution and that the property in question is devoted to charity is beyond ques-

tion and is not denied, but the objection made before the board of review and now insisted upon is that the home is not a public charity because its benefits are restricted to Master Masons, their widows and orphans, and that such limitation deprives the institution of the character of a public charity. That question has been argued by counsel (here follows a discussion of the proposition as presented) * * * A different conclusion was reached in *Widows and Orphans Home of Odd Fellows v. Commonwealth,* 126 Ky. 386, and *City of Indianapolis v. Grand Master of Grand Lodge of Indiana,* 25 Ind. 517, for reasons which appear to us to be sound.

"It is the duty of the public to care for the indigent and the poor who are sick and afflicted, and while the public burden is not for the relief of aged and indigent Masons as such, the public is not relieved from the burden because they are Masons, and any institution which serves no selfish interest, but discharges, in whole or in part, any such duty, is a public charity. To constitute a public charity the benefits must not be conferred upon certain and defined individuals but must be conferred on indefinite persons composing the public or some part of the public, but the indefinite class may be of one sex or the inhabitants of a particular city, town or county or members of a particular religious or secular organization. 5 R. C. L. 293; 11 C. J. 338. The fact of such discrimination among those members of the general public who need relief does not deprive the charity of its public nature."

The final conclusion of the Illinois court was: "The primary objects of a Masonic lodge being benevolence and charity, such a lodge is a charitable institution, and the Masonic Home of the grand lodge of Masons of Illinois, together with the land used for its maintenance, is exempt from taxation as the property of a public charity."

See, also, *Masonic Home v. Sedgwich County,* 81 Kan. 859; *Morrow v. Smith,* 145 Ia. 514; *Cumberland Lodge v. Mayor and City Council of Nashville,* 127 Tenn. 248; *State v. Packard,* 35 N. Dak. 298; *Hardin v. Rock Springs Lodge, A. F. & A. M.,* 23 Wyo. 522.

In this jurisdiction it is not the character of the owner but the nature of its use which must in each individual case furnish the test for determining the tax exempt character of the property involved. If that use be truly and exclusively religious, or exclusively educational, or exclusively charitable, or a combination of the three uses, and involves no other use, for the reasons expressed in the cases cited, we are not concerned as to whether it be strictly a public charity or a private charity in the technical sense of these terms. *Plattsmouth Lodge v. Cass County*, 79 Neb. 463; *Young Men's Christian Ass'n v. Lancaster County*, 106 Neb. 105.

So, too, we are committed to the doctrine that, in determining whether or not property falls within a tax exemption provision, the primary or dominant use, and not an incidental use, will control. *House of the Good Shepherd v. Board of Equalization*, 113 Neb. 489; *St. Elizabeth Hospital v. Lancaster County*, 109 Neb. 104; *Central Union Conference Ass'n v. Lancaster County*, 109 Neb. 106; *Mary Lanning Memorial Hospital Ass'n v. Adams County*, 117 Neb. 618.

It follows that it fairly appearing from the evidence that the ownership as well as the primary and dominant use to which the Temple was devoted, at and for a number of years prior to the assessment of the taxes in suit, were exclusively for educational, religious, and charitable purposes, and that it was not owned or used for financial gain or profit to either owner or user, the district court erred in denying the claim for exemption.

It is to be noted that the material facts established by the evidence in the instant case differ in some important particulars from those recited in the opinion in *Scottish Rite Building Co. v. Lancaster County*, 106 Neb. 95. So, too, the controlling statute and constitutional provision relating to the subject of the action have both been amended since the case last referred to was decided. The case of *Mt. Moriah Lodge, A. F. & A. M., v. Otoe County*, 101 Neb. 274, determines only the insufficiency of the evidence

in that case to establish the right to exemption. However, to avoid any uncertainty which might otherwise arise, *Scottish Rite Building Co. v. Lancaster County,* 106 Neb. 95, and *Mt. Moriah Lodge, A. F. & A. M., v. Otoe County,* 101 Neb. 274, so far as in conflict with the conclusions here announced, are overruled.

For the foregoing reasons, the judgment of the district court is reversed and the cause remanded, with directions to enter a decree in conformity with this opinion.

REVERSED.

GEORGE SALISBURY, APPELLEE, V. BERRY MOTOR COMPANY: LEO BERRY, APPELLANT.

FILED FEBRUARY 19, 1932. No. 27942.

1. **Pleading**: DEMURRER: "DEFECT OF PARTIES." A "defect of parties" means an absence of necessary parties, and the objection to a pleading that there are too many parties, or unnecessary parties, cannot be raised by a demurrer on the ground that there is "a defect of parties defendant."
2. **Instruction** given by the trial court, set out in part in the opinion, *held* erroneous.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Reversed.*

Nichols & Johnson and *W. M. Elmen,* for appellant.

W. P. Rooney, Allen G. Fisher and *Charles A. Fisher, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and REDICK, District Judge.

EBERLY, J.

This is an action at law by George Salisbury, as plaintiff, against the Berry Motor Company, a copartnership consisting of Leo Berry and Lyle Berry, Leo Berry, and Lyle Berry, defendants, on an alleged oral contract of employment at a definite wage. To the amended petition of plaintiff the defendant Leo Berry demurred on the

grounds: First, that the petition disclosed that there was "a defect of parties defendant;" and, second, that it did not allege facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendant then filed a pleading containing an answer and cross-petition, the allegations of which were traversed by plaintiff's reply. There was a trial to a jury resulting in a verdict against the defendant Leo Berry in a sum stated, a finding for plaintiff on defendant's cross-petition, and judgment was entered thereon. From the judgment overruling his motion for a new trial, the defendant Leo Berry appeals.

The first assignment of error here presented challenges the correctness of the trial court's ruling upon the demurrer. So far as the general demurrer is concerned, it is of course waived by the subsequent answer of the demurrant. It is insisted, however, that the demurrer for "misjoinder of parties defendant" should have been sustained. An inspection of the record discloses, however, that no demurrer on this ground appears therein. "Misjoinder of parties defendant" is not the legal equivalent of "a defect of parties defendant."

"A defect of parties means an absence of necessary parties and the objection that there are too many parties cannot be reached by a demurrer on this ground." 6 Standard Ency. of Procedure, 899. See, also, *Boldt v. Budwig*, 19 Neb. 739.

The cross-petition of the defendant set up a claim for damages alleged to have been caused by negligence of the plaintiff in driving defendant's automobile, which it is alleged resulted in wrecking and injuring the same, causing damages in the sum set forth. The trial court in its instruction No. 12 epitomized the allegations of defendant's cross-petition, including a number of specific and distinct allegations of negligence on the part of the plaintiff set forth therein, and added to this summary this direction: "If the defendant has failed to prove *each one and all* of the foregoing allegations of his cross-petition by a preponderance of the evidence, or if the evidence thereto be

evenly balanced, * * * then the defendant cannot recover upon his cross-petition and your verdict should be for the plaintiff thereon." (Italics ours.)

It is manifest that a defendant does not have to prove everything he alleges in his cross-petition, provided what he does prove constitutes a good cause of action against the plaintiff. In view of the evidence before us, we are convinced that instruction No. 12, in the form given, was both erroneous and prejudicial, and the defendant was thereby deprived of a fair submission of his cross-petition to the jury.

It follows that, for the reasons stated, the judgment of the trial court should be, and hereby is, reversed and the cause is remanded for further proceedings in harmony with this opinion.

REVERSED.

AMERICAN GAS CONSTRUCTION COMPANY, APPELLEE, V. ROBERT Y. LISCO, JR., APPELLANT: C. I. TENNEY, GARNISHEE, APPELLEE.

FILED FEBRUARY 19, 1932. No. 28185.

Corporations: ESTOPPEL. When a party contracts with an imperfectly organized corporation, he is estopped to deny its corporate existence and is precluded from recovering from its members individually as if they were partners.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

Allen G. Fisher and *Charles A. Fisher*, for appellant.

E. D. Crites and *F. A. Crites, contra.*

Heard before GOSS, C. J., ROSE, DEAN, EBERLY, DAY and PAINE, JJ.

DAY, J.

This is an action brought by the American Gas Construction Company against Robert Y. Lisco, Jr., to recover

the sum of $4,000 as the balance due on a written contract for the sale of equipment for the manufacture of gas, purchased by the defendant from plaintiff. The defendant does not dispute that the balance due is unpaid, but seeks to establish an offset or counterclaim in the sum of $4,000 or more which he alleges C. I. Tenney owes him on a different contract. The trial court sustained the special appearance of C. I. Tenney, dismissed an attachment and garnishment, and upon motion struck from the answer and cross-petition the set-off and counterclaim. From this order the defendant appeals.

The petition of the plaintiff alleges that the plaintiff is a corporation organized and existing under the laws of the state of Iowa; that the defendant entered into a contract to purchase certain equipment for the installation of a gas-works at Laramie, Wyoming; that the equipment was delivered; that the contract price was $27,000, and that there is a balance of $4,000 unpaid. The defendant in his answer denies the corporate existence of the plaintiff. He further alleges that the real party plaintiff is C. I. Tenney. Defendant then proceeds with what is termed a counterclaim and cross-petition against C. I. Tenney, in which he sets out another contract under which C. I. Tenney is indebted to him in the sum of $5,000 and prays judgment against C. I. Tenney, doing business under the name of American Gas Construction Company, in the sum of $4,000. A writ of attachment is issued and money in the hands of the defendant due upon the contract sued upon by the plaintiff in this action is garnished as the money of C. I. Tenney. There was no personal service upon C. I. Tenney in Dawes county, Nebraska, and the only service upon Tenney is based upon the attachment and garnishment.

The claims set out in the pleadings arise by virtue of two different contracts. The contract set out in the set-off and counterclaim is signed by C. I. Tenney, while the one sued upon by plaintiff is signed by the plaintiff, by D. C. Tenney, Secretary. Our statutory provisions are as follows: Under section 20-813, Comp. St. 1929, defining

a counterclaim, it must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." Under section 20-816, Comp. St. 1929, a set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon a contract or ascertained by the decision of the court. The set-off and counterclaim in this case does not arise out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action. Mutuality of demands is necessary to entitle a defendant to a set-off or counterclaim. "A claim on the part of a defendant, which he will be entitled to set off against the claim of a plaintiff against him, must be one upon which he could, at the date of the commencement of the suit, have maintained an action on his part against the plaintiff." *Simpson v. Jennings*, 15 Neb. 671; *Bank of Crab Orchard v. Myers*, 120 Neb. 84.

The defendant in this case contends that the plaintiff was not in fact a corporation, for that its life had expired prior to the execution of the contract by operation of law, and that C. I. Tenney was then doing business under the corporate name as a trade-name. It is also seriously contended that C. I. Tenney is the real plaintiff in interest. The argument of the defendant upon the question is plausible and persuasive. However, we are confronted with certain well-established principles of law. When a party contracts with an imperfectly organized corporation, he is estopped to deny its corporate existence and is precluded from recovering from its members individually as if they were partners. *Nebraska Nat. Bank of York v. Ferguson*, 49 Neb. 109; *Livingston Loan & Building Ass'n v. Drummond*, 49 Neb. 200; *Estate of Davis v. Watkins*, 56 Neb. 288; *Exchange Nat. Bank v. Capps*, 32 Neb. 242. Since the defendant entered into this contract with the corporation and has dealt with the plaintiff as a corporation, he

is estopped to deny its corporate existence, after having received the benefits of the contract. The defendant has no just complaint because he now finds himself in the position which he thought he was in when he entered into the contract. Under this view of the case, the order sustaining the special appearance of C. I. Tenney disallowing the attachment and striking from the answer the set-off and cross-petition was proper.

Having reached this conclusion, other questions presented by the briefs become unimportant. The judgment of the district court is

AFFIRMED.

ERICKA C. JOHNSON ET AL., APPELLANTS, V. HASTINGS & HEYDEN ET AL., APPELLEES.

FILED FEBRUARY 19, 1932. No. 28149.

1. **Evidence** examined, and *held* to sustain the judgment.
2. **Contracts**: FRAUD: RESCISSION. In a suit for cancelation and rescission of a contract for exchange of property, based on fraud and misrepresentation, it is incumbent upon the plaintiff to establish facts constituting actionable fraud, and a failure to do so will not warrant the court in disturbing the contract.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

A. H. Murdock and *Arthur C. Pancoast*, for appellants.

King & Haggart, Walter R. Johnson and *E. H. Westerfield, contra.*

Heard before ROSE, GOOD and EBERLY, JJ., and CARTER and CHASE, District Judges.

CHASE, District Judge.

This is a suit in equity in which the plaintiffs, as husband and wife, pray for the cancelation of a contract for the exchange of properties.

From the record it appears that the plaintiffs, Ericka C. Johnson and Eric Johnson, on and prior to the 20th day of May, 1930, were joint owners of 30 shares of stock in the Occidental Building & Loan Association, and 50 shares of stock in the Standard Savings & Loan Association; that one Henshaw, who claimed to be a salesman for a tract of land, known as West Dodge Addition, in Douglas county, Nebraska, approached the plaintiffs offering to make an exchange of several lots in this addition for their building and loan stock, to which they finally agreed, and the transaction was consummated for the Standard Savings & Loan stock on or about the 20th day of May, 1930, and for the Occidental Building & Loan stock on or about the 28th day of May, 1930, by delivering the certificates and accepting the deed for the lots. The plaintiffs contend that the said Henshaw, through whom the whole transaction was handled, was acting as agent of the defendants Hastings & Heyden and the Investors Syndicate, Inc., in the representations leading up to, and in the consummation of, the exchange of this property; that the plaintiffs were induced by fraud and misrepresentation to enter into the contract of exchange.

The principal specifications of fraud and misrepresentation which the plaintiffs allege induced them to make the exchange are that said Henshaw represented the value of the lots to be greatly in excess of their real value; that he represented that the building and loan associations in which plaintiffs held stock were in financial difficulties and that said stock was not worth more than 30 per cent. of its face value; that he further represented to them that one Walton had agreed to purchase one of the lots for which plaintiffs were dealing and had paid down the sum of $100 therefor, which contract would be turned over to plaintiffs in case they completed the transaction; that upon this basis, and believing these representations and relying thereon, plaintiffs entered into the transaction; that the said Henshaw was acting as agent of the defendants Hastings & Heyden and the Investors Syndicate, Inc., and that

any fraud or misrepresentation he may have indulged in, to induce a consummation of this transaction, was imputable to both these defendants.

The trial court, upon the evidence adduced by the parties, found against the plaintiffs, and ordered the suit dismissed. From that judgment plaintiffs appeal to this court.

We have carefully read the testimony for the purpose of determining whether or not plaintiffs were defrauded or overreached in any manner by any person in connection with this transaction. It fairly appears from the record and from the testimony of the plaintiffs themselves that they knew the Standard Savings & Loan Association was in the hands of a receiver before this transaction was made, and that the Occidental Building & Loan Association was not paying dividends at that time; that they were very anxious to get their money out of their building and loan stock; that the wife inspected the lots on two or three different occasions and the husband also made a minute inspection of the lots, and both realized that the quoted price of the real estate was somewhat above its real value, but were of the opinion that it was worth as much or more than the building and loan stock. The whole transaction appears to be, as numerous transactions have been found to be in the past few years, a bad bargain, which the plaintiffs entered into with their eyes open and dealing at arms length with the said Henshaw. Courts of equity cannot and will not make contracts for individuals. The function of a court of equity in such suits is merely to construe the contract the individuals themselves have made in the light of the evidence, for the purpose of determining whether one person has been overreached by another or unduly imposed upon by having been induced to enter into a transaction through misrepresentation of fact to such an extent that it would amount to actionable fraud. Ordinarily, a mere expression of an opinion as to the value of property, where persons have had an opportunity to inspect the character, quality and location there-

of, is not a misrepresentation of fact which would constitute actionable fraud. The parties had been negotiating the exchange for some time prior to the consummation thereof. If the plaintiffs did not feel themselves competent to form an opinion as to the value of the real estate, they could have inquired of disinterested third persons more familiar with its value and obtained their opinion. We find no evidence in the record where they were that vigilant. They appear to have been willing to accept their own judgment and that of Henshaw in the matter. The plaintiffs could not complain of Henshaw's alleged misrepresentations as to the value of their building and loan stock, for the reason that the law presumes the owner of property to be in position to know its value, and under that theory they could in no sense be misled by an opinion of a third party as to the value thereof. This court has held that the owner of property is a competent witness to testify as to the value of such property, without any further foundation than that of established ownership.

After a careful examination of the entire record, we reach the conclusion that the trial court was correct in his finding. Upon this theory the question of agency becomes immaterial. The judgment is, therefore,

AFFIRMED.

ZELLA KELLOGG ET AL., APPELLANTS, V. CARRIE E. MCDONALD ET AL., APPELLEES.

FILED FEBRUARY 25, 1932. No. 27879.

Mortgages: POSSESSION: NOTICE. Possession of land by a third person does not put a mortgagee upon inquiry with reference to anything which he would not have learned if he had made inquiry as to the ownership from such occupier.

APPEAL from the district court for Dixon county: MARK J. RYAN, JUDGE. *Affirmed.*

M. F. Harrington and *George M. Harrington*, for appellants.

Sidney W. Smith and *C. A. Kingsbury, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

PER CURIAM.

This is an action which was brought in the district court for Dixon county to quiet the title in the plaintiffs to 90 acres of land, in the course of which suit a restraining order was entered, restraining the defendant, the Penn Mutual Life Insurance Company, from proceeding to sell at foreclosure sale a quarter-section of land, which included the 90 acres in question, which decree of foreclosure had been entered in the district court of the United States for the district of Nebraska. At the trial of the case, the district court for Dixon county entered a decree finding that the mortgage of the defendant is a first lien on the above described real estate, and is superior to the interests of the plaintiffs therein, and dissolved the temporary injunction, denied the permanent injunction, and dismissed the action to quiet title brought by the plaintiffs.

The evidence is voluminous, but the salient facts may be set out very briefly, as follows: J. J. Kellogg gave a $3,000 mortgage, dated July 5, 1904, upon 160 acres of Dixon county land near Allen, Nebraska, to the Connecticut Mutual Life Insurance Company, and later conveyed 40 acres of said land to his wife. He left nine living children by a first wife and five children by his second wife at the time of his death on January 6, 1918, and a posthumous son, Francis, one of the plaintiffs herein, was born shortly after his death. He died intestate, and the county court decreed that five-twentieths of the land passed to his widow and one-twentieth to each of his 15 children. Mr. Kellogg had at one time owned a section of land, and had deeded one-half of it to his nine older children and had deeded another 160 acres to the four oldest children of the second marriage, for which reason quitclaim deeds were given by the older children, leaving the wife and youngest children to be provided for out of this remaining

160 acres, out of which he had given his wife a deed to one 40 acres, the whole 160 acres being included in the mortgage given to the Connecticut Mutual Life Insurance Company, as above set out. The mortgage being in default, a foreclosure action was brought, and all parties were properly served. The property was bid in for $16,000 by V. W. McDonald. Upon June 7, 1922, said bidder, with his wife, gave a mortgage for $10,000 to W. S. Gilman, of Sioux City, Iowa, for the purpose of raising money to pay his bid on said land. This mortgage was recorded June 19, 1922, and upon July 6, 1922, the sheriff's deed was issued.

The surplus above the amount due the Connecticut Mutual Life Insurance Company was distributed to the proper heirs, and the mother receipted in full as guardian for the proper amounts due to her minor children.

For the purpose of paying off his mortgage to Gilman, the said McDonald gave a mortgage for $10,000 upon the same 160 acres to Frank H. Binder, dated March 23, 1923, and upon May 10, 1923, Gilman released his first mortgage. Upon May 25, 1923, Binder assigned his mortgage to the Penn Mutual Life Insurance Company, which mortgage being in default, a decree of foreclosure was entered upon March 12, 1927, in the district court of the United States at Omaha, all parties to said title and mortgage being duly served. It is alleged in the answer in this case that each and all of the mortgagees, to wit, W. S. Gilman, Frank H. Binder, and the Penn Mutual Life Insurance Company, were without knowledge of any alleged claim or interest of the plaintiffs in or to said property, nothing appearing of record in reference thereto.

The plaintiffs claim, on the other hand, that V. W. McDonald, who had died prior to the trial, did not purchase said land for $16,000 for and on his own behalf, but that he did so under an arrangement which was reduced by him to a written declaration of trust upon July 31, 1924, setting out that he now held "and will continue to hold the same in trust only for the use and benefit of said minor

heirs," being the plaintiffs in this action, Zella Kellogg and Francis Kellogg, such trust instrument covering 90 acres of the 160 acres in the mortgage given to the Penn Mutual Life Insurance Company. Counsel for appellants say in their brief: "We think it is sufficiently set forth from the very beginning what our contention is. We simply say that these minor children own this 90 acres of land; that the title was fraudulently taken away from them by McDonald; that they were in possession of the land when the Penn Mutual mortgage was taken."

Of course, these small children were not in possession, but the land was worked by several tenants in small tracts, who each rented it of V. W. McDonald, who gave the mortgage which the Penn Mutual Life Insurance Company owns and is foreclosing. These tenants all knew it as the old Kellogg farm or Kellogg estate, and no one of them knew anything in regard to the real and actual title or ownership of the land they farmed.

The broad rule is that possession of real estate is constructive notice to all the world of whatever claim the possessor asserts, whether legal or equitable. 13 L. R. A. n. s. 51. And it cannot be claimed that he is not chargeable with notice of what the actual right and title of the actual possessor was and is. *Essex County Nat. Bank v. Harrison*, 57 N. J. Eq. 91.

On this contention, the evidence of each of the tenants who were farming portions of this land was taken, and if the mortgagees had inquired of each of them who owned the land, not one of them would have given an answer that would have warned the mortgagees that the title and ownership was other than as shown by the abstracts. In *Smoke v. Pope*, 119 Neb. 432, the court say: "Possession of land may be notice to the world of possessory rights of which inquiry of the occupant would elicit knowledge." It is clear that none of the tenants knew, or could have communicated, any information as to the secret declaration of trust. *Engdahl v. Laverty*, 110 Neb. 672; *Dengler v. Fowler*, 94 Neb. 621.

The doctrine that possession is notice of whatever right or title the occupant has is really a rule of equity, and grows out of the equitable doctrine of notice, and whatever is sufficient to put a party upon inquiry is good notice of everything which it is afterwards found that such inquiry, if diligently prosecuted, would have disclosed.

A visible state of things inconsistent with a perfect right in the person who proposes to sell is the foundation of the duty to make inquiry. *Dix v. Wilkinson,* 149 Ga. 103.

It is a settled rule in this state that, if the possession by one of a piece of land is consistent with the record title, the purchaser is not bound to inquire concerning the title indicated by the possession, because no inquiry is suggested by it. *King v. Lane,* 186 S. W. (Tex. Civ. App.) 392; *Hunt v. Ellis,* 27 N. M. 397.

The English rule is that a purchaser of land, neglecting to inquire into the title of the occupier, is not affected by any other equities than those which such occupier may insist on. *Hunt v. Luck,* 1 Ch. Div. 45, 70 L. J. Ch. n. s. 30.

Possession of real estate is notice to an intending purchaser or mortgagee of whatever rights, title or interest the possessor then asserts. This is the holding in *Laughlin v. Gardiner,* 104 Neb. 237; but on rehearing, 104 Neb. 245, this was amplified in these words: "The evidence is undisputed that such an inquiry would have disclosed that they were then merely holding by sufferance, ready to yield possession at any time, and making no claim of any interest in the property. Their possession therefore was not notice of any infirmity in the title."

Nor does the possession of land by a third person put a purchaser "upon inquiry of anything which he would not have learned if he had duly and fully inquired of the person in possession, in regard to the rights he claimed in the premises." *Canfield v. Hard,* 58 Vt. 217. See *Dickey v. Lyon,* 19 Ia. 544; *Walker v. Neil,* 117 Ga. 733.

It is clear from the evidence that the possession of each of the tenants was not different from what it had been before there was any secret trust agreement, and no one of

these tenants had any knowledge thereof which he could have imparted to the mortgagee, which would have given any additional information to what the record title disclosed.

Plaintiffs allege that they were in possession of said premises, and that this was notice to the world of their ownership of said premises. Is not the burden of proof to establish this fact upon the plaintiffs? If the several tenants knew nothing of the ownership of these minor plaintiffs of the land they were farming, have the plaintiffs sustained the allegation?

The Penn Mutual Life Insurance Company is asking that its rights be protected by subrogation to the Gilman mortgage, which is clearly a good mortgage, given as part of the foreclosure proceedings. The plaintiffs seek to have the mortgage canceled as to their land. Can this equitable relief be granted them without their doing equity by paying off a mortgage given under these circumstances? We think not. *Henry v. Henry*, 73 Neb. 746; *Betts v. Sims*, 35 Neb. 840. The facts as proved bring this case clearly within our holdings that conventional subrogation arises where one pays the debt of another under an agreement, express or implied, that the person paying should be subrogated to the liens existing as security for the debt. *Hoagland & Co. v. Decker*, 118 Neb. 194; *Prudential Ins. Co. v. Qualset*, 116 Neb. 706.

The district court was right in refusing to grant a permanent injunction and further delay the sale directed by the federal court, because that is a court of coordinate jurisdiction, which first acquired jurisdiction of the subject-matter, and the judgment of the district court is hereby

AFFIRMED.

ARTHUR A. FOREMAN V. STATE OF NEBRASKA.

FILED FEBRUARY 25, 1932. No. 27857.

1. **Information:** VERIFICATION. An information verified on the information and belief of the county attorney before the clerk of the district court is, in this respect, a sufficient compliance with the law.
2. **Banks and Banking:** MISAPPLICATION OF FUNDS: BOOKS OF ACCOUNT: FALSE ENTRIES. "A bank officer who wilfully misapplies the funds of the bank, or who makes or causes to be made a false entry in its books, knowing it to be false, cannot be heard to say that he did the act innocently." *Morse v. United States*, 174 Fed. 539.
3. **Criminal Law:** INTENT: EVIDENCE OF LIKE OFFENSES. When certain evidence is offered and received in a criminal action to disclose the attitude or the tendency of a defendant in former like transactions, it is not error to admit such evidence with the end in view of establishing the then present intent of the defendant in the perpetration of the crime charged in the information.
4. ———: INSTRUCTIONS. When an objection is made in behalf of a defendant in a criminal action in respect of an instruction given by the trial court, the judgment will not be reversed when the instructions, considered in their entirety, are not prejudicial to the lawful rights of the defendant.

ERROR to the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Leonard A. Flansburg, O'Sullivan & Southard and *Cook & Cook*, for plaintiff in error.

C. A. Sorensen, Attorney General, and *F. S. Howell, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

DEAN, J.

Arthur A. Foreman, the defendant, at all times material to the facts here involved, namely, from June 11, 1927, until October 7, 1929, was the president and a director of the Farmers State Bank of Overton. December 10, 1930, the defendant was informed against in the dis-

trict court for Dawson county and there charged with having made certain false entries and deceptive statements in respect of the record books of the Overton bank, with the unlawful intent then and there and thereby to deceive the secretary of the department of trade and commerce in respect of the true financial condition of the bank.

Upon submission, the jury returned a verdict finding the defendant guilty as charged in the information in respect of counts numbered 9, 13, and 14 thereof, and not guilty as to counts numbered 1, 2, 3, 4, and 5 thereof. And as to counts numbered 6, 7, 8, 10, 11, and 12 of the information, the jury reported they were unable to agree. Thereupon the court, pursuant to the verdict, sentenced the defendant to serve a term of from two to four years on each of the counts numbered 9, 13, and 14, the sentences to run consecutively. From the judgment so rendered, the defendant prosecutes error.

A plea in abatement was filed by the defendant wherein it is alleged that the trial judge was without jurisdiction in the premises on the ground that the original complaint was not verified upon oath of the county attorney. The court overruled the plea in abatement and also the defendant's demurrer. We do not find error in the court's ruling in the premises. The information was verified in the following language by the county attorney: "T. M. Hewitt, being duly sworn according to law, says the facts stated in his foregoing information are true as he verily believes." The information was sworn to before the clerk of the district court and, under the law, we think such information, verified as it was on the information and belief of the county attorney, was sufficient. We have held: "The sufficiency of an oath to a complaint or information is not fixed by our state Constitution, but is a matter of legislative and judicial determination." *Watson v. State*, 109 Neb. 43. This statement also appears in the *Watson* case: "In some jurisdictions, notably the federal districts represented by the courts cited, *supra*, it has been held that an oath upon information and belief is not an oath, and that a complaint

or information verified upon information and belief is void. This court is committed to a different rule." And in *Sharp v. State*, 61 Neb. 187, we held: "It is sufficient if an information is verified by the county attorney, on information and belief." See, also, *Washburn v. People*, 10 Mich. 372. We conclude that the requirement in the matter of the verification upon oath of the county attorney sufficiently complies with the law of this state.

In March, 1929, the affairs of the Overton bank were examined by J. Y. Castle, a bank examiner. He testified that the directors, pursuant to his advice, voted to assess the capital stock at 100 per cent. in order to avoid closing the bank. A copy of the minutes of the meeting was forwarded to the state banking department and it is therein stated that an assessment had been previously made of the 172 shares of stock jointly owned by the directors. A duplicate deposit slip was also forwarded to the department and, in a letter by Foreman, the report of the bank examiner stating that an assessment had been made on the capital stock was confirmed. It appears, however, that a later inventory of the books of the bank by Castle disclosed that a record of the assessment had never been entered therein. Under the law, state banks are required to have a legal reserve of 15 per cent. of their deposits on hand. It appears that the South Omaha State Bank, at the time, was a correspondent of the Overton bank and the defendant's brother-in-law was then the president of the Omaha bank.

Under count 9 of the information, the defendant is charged with having made a false report to the banking department at Lincoln wherein he stated that the Omaha bank owed the Overton bank $27,798.69, whereas only $17,798.69, and no more, was the amount owing to the Overton bank. The defendant testified that he sent a note to the Omaha bank for $10,000, but that the president of that bank returned the note unused for the reason, as stated in a letter to the defendant, that the liability ledger of the Omaha bank showed that the Overton bank already owed $26,000, and this was the loan limit. But it is un-

contradicted that the defendant, notwithstanding the refusal of credit, failed to charge off the amount of $10,000 from his books. The Omaha bank at the end of the month sent a copy of its ledger sheet to the Overton bank, but no mention is made therein of the $10,000 item.

From the evidence of several of the bank's former employees it appears that certain erasures and changes were made in the figures of the bank books from time to time under the direction of the defendant. But, in respect of such alterations, the defendant testified that they were merely "corrections" of certain mistakes in entries.

The defendant admits that the reserve of the bank would have been much lower had the $10,000 item been omitted from the report that was forwarded to the banking department. And he admitted that the bank's reserve was then lower than the 15 per cent. required under the law. The defendant also made it plainly appear that he was aware of the fact that the department officials would infer from his report that the Overton bank's reserve was higher than the fact would warrant. And yet, notwithstanding the fact that the defendant received the letter from the Omaha bank refusing any further credit, he made no effort to make a clear statement to the banking department in respect of the actual then present condition of the bank. The evidence shows that, when previous reports were due from the bank to the banking department, the defendant borrowed credit to build up the then current reserve of the bank. That the $10,000 was included by the defendant in his report with the wilful intent to deceive the banking department officials as to the true financial status of his bank clearly appears.

The defendant contends that it was through the instigation and under the direction of the bank examiner that the assessment and the subsequent report in respect thereof were made. We think this contention is without merit. From a review of the defendant's evidence it appears that he then knew that the bank would be closed unless its reserve was reported to be larger than was the fact. Nor

does it appear that the checks were made out, and the duplicate deposit tickets made out and a letter written merely because the examiner so directed. The defendant admitted that he did it to have his bank remain open for business. And, as stated in *Morse v. United States*, 174 Fed. 539: "A bank officer who wilfully misapplies the funds of the bank, or who makes or causes to be made a false entry in its books, knowing it to be false, cannot be heard to say that he did the act innocently."

Complaint is made in the admission of certain evidence relating to other reports by the defendant to the banking department. The evidence was received, however, only to show the disposition of the defendant in former transactions and, where such evidence was admitted for the purpose of proving intent, the court did not err in refusing to exclude it. *Clark v. State*, 79 Neb. 473; *State v. Sparks*, 79 Neb. 504; *Chamberlain v. State*, 80 Neb. 812.

Defendant also complains of the giving of instruction numbered 9 in that it is alleged that the court there placed unnecessary emphasis on evidence that was directed against the defendant. That part of the instruction above referred to follows:

"You are doubtless aware the state has not been able to produce a witness who testified as to what the defendant's intent was when he made or caused to be made book entries or statements as set forth in the counts of the information, except the testimony of William Nagel as to the ten thousand dollars credit on the books of the Farmers State Bank of Overton, Nebraska, as alleged in counts 9, 11, and 12 of the information."

It does not appear that the instruction complained of in any manner even tends to prejudice the jury against the defendant. The evidence of the defendant himself clearly concedes the fact that he knowingly, wilfully, and of his own volition made the report to the state banking department with the intent to thereby deceive the officials thereof. It is elementary that, when complaint is made of one instruction given by the court to the jury, the ver-

dict and judgment thereon will not be reversed when the instructions, considered in their entirety and as a whole, are not prejudicial to the lawful rights of the defendant.

The defendant has urged other assignments of alleged error which we have examined and considered. But we find none of them prejudicial to the defendant.

The judgment is right and it is therefore

AFFIRMED.

WENCEL H. KIRCHMAN V. STATE OF NEBRASKA.

FILED FEBRUARY 25, 1932. No. 27993.

1. **Indictment.** The defendant, in a felony case, should find in the indictment a plain and concise statement of the charge against him. Yet all such necessary details may be set out therein, if without prejudice to the substantial rights of the defendant, as will enable the court to pass upon the question of whether it is sufficient to charge a criminal offense, and, on the other hand, be sufficient to inform the defendant of all such facts as will clearly identify the entire transaction for which he is held to answer.
2. **Criminal Law: INSTRUCTIONS.** It is the better practice in a criminal case for the trial court to charge the jury, in concise and informal language, as to the material facts which must be proved beyond a reasonable doubt to authorize a conviction, rather than to copy the information or indictment into its instructions.
3. ———: ———. It is a well-settled rule that it is not necessary to give an instruction in the exact language offered by counsel, where the same subject is adequately covered by instructions given by the trial court.
4. ———: ———: ACCUSED AS WITNESS. It was not error to call attention, by an instruction, to the fact that the defendant had availed himself of his right under the law to testify as a witness in his own behalf, and his credibility may be impeached the same as any witness.
5. ———: CAUTIONARY INSTRUCTION. In the trial of important felony cases, when the jury may have been influenced to a greater or less extent by the feelings of the audience, or unduly swayed by appeals in the arguments, it is proper for the trial judge to give a cautionary instruction, such as set out herein, cautioning the jury not to allow sympathy or prejudice to affect their deliberations, and to be governed solely by the evidence and the instructions of the court.

ERROR to the district court for Seward county: HARRY D. LANDIS, JUDGE. *Affirmed.*

Norval Brothers, O'Sullivan & Southard and *H. A. Bryant*, for plaintiff in error.

C. A. Sorensen, Attorney General, Irvin Stalmaster and *J. J. Thomas, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

PAINE, J.

Upon September 18, 1930, an indictment, properly indorsed "A True Bill," was returned by the grand jury in Saunders county, charging the plaintiff in error, hereinafter called the defendant, Wencel H. Kirchman, who was the cashier of the Nebraska State Savings Bank, of Wahoo, Nebraska, and another, with intent to deceive, injure and defraud said bank, its officers, and other persons, by executing a release of a mortgage in the sum of $7,500 and discharging the same of record. The defendant filed a demurrer to the indictment, and, upon its being overruled, made application for a change of venue, with a showing in support thereof, and thereafter the state confessed said motion and the district judge directed that the venue be changed to Seward county, Nebraska. Trial was begun upon April 13, and upon April 24, 1931, the jury returned a verdict of guilty, upon which verdict the defendant was sentenced to serve 10 years in the penitentiary and to pay a fine of $2,500.

Defendant prosecutes error to review the record in this court. The petition in error sets out some 24 allegations of error, each of which has been carefully considered by this court. It is especially urged in the brief that the court erred in overruling the defendant's demurrer to the indictment, and in the giving of each of the 22 instructions, and in refusing to give 6 instructions offered by the defendant. It is also urged that the indictment was not sufficiently specific, definite and certain to meet the re-

quirements of section 3, art. I of the Constitution of the state of Nebraska, which provides that no persons shall be deprived of their liberty without due process of law, and that the indictment also violated, for the same reason, section 1 of article XIV of the amendments to the Constitution of the United States. It is also contended that the sentence imposed upon the defendant is illegal and excessive, and is null and void because the same is made to run consecutive to a sentence previously pronounced.

The evidence, which is found set out in two large leather-bound volumes of the bill of exceptions, shows that the defendant, who is 47 years of age, was born at Wahoo, Nebraska, and has always resided there; that he is a married man, with a family, and has been connected with the Saunders County National Bank at Wahoo since he was 17 years of age, starting in as a messenger; that the father of the defendant was president of both the Saunders County National Bank and the Nebraska State Savings Bank up to the time of his death in July, 1924, and was succeeded in that position in both banks by Frank J. Kirchman, uncle of the defendant, who held that office until both banks closed on April 15, 1930; that the defendant was cashier of both banks; that in the Nebraska State Savings Bank, the uncle drew $125 a month as president, while the defendant drew $50 a month as cashier; the uncle drawing $200 as president of the Saunders County National Bank, the defendant drawing $175 as cashier of the latter institution, and both the president and the cashier had sons working in the banks. Each of the banks occupied the same banking rooms, there being no partition between the two banks, but the Nebraska State Savings Bank, which began business March 17, 1909, had its name in a sign over one of the wickets in the banking room of the Saunders County National Bank. The defendant and his uncle occupied adjoining desks, and the uncle had a little private room adjoining his desk, and only rarely sat at his desk out in the banking room, and usually transacted his business in his private office.

Nels and Amanda Peterson borrowed of the Nebraska State Savings Bank $7,500, and gave a mortgage, dated April 3, 1923, upon 120 acres of land to secure the same. The notes were drawn in the form of three first mortgage bonds, in the sum of $2,500 each, which were sold to Daniel Dailey, Frank Dolezal and Martin Thorson. Nels Peterson died July 1, 1924, leaving his estate and his widow both bankrupt. The land described in the mortgage was sold to the defendant by the executor, Charles Slama, on June 14, 1927, for $10, subject to the mortgages outstanding. The defendant, being the owner of this land, found a purchaser in one John Pokorny for $13,200, the deed to John and Antonia Pokorny being dated September 26, 1928. In payment of this sale, Pokorny paid $6,000 in cash on September 26, 1928, and gave a mortgage upon October 1, 1928, for $7,200 to the Nebraska State Savings Bank. The defendant, as cashier, and his uncle, Frank J. Kirchman, as president of the Nebraska State Savings Bank, in order to show a clear title for the Pokorny sale, executed on October 11, 1928, and filed on October 25, 1928, the said bank's release of the original Peterson mortgage in the sum of $7,500, but did not take up or pay off the three outstanding mortgage bonds of $2,500 each, secured thereby, and, for the crime of issuing this release, he was tried by a jury in Seward county. The original Peterson mortgage became due in 1928, and the defendant and his wife, Lila, issued an extension agreement on it for five years upon April 1, 1928, giving new coupon notes, with interest, to the holders of the three mortgage bonds, which was done a short time before he executed the release of the $7,500 mortgage back of these bonds. The holders of the three $2,500 renewal bonds continued to receive their interest for the years 1929 and 1930, notwithstanding the security had been released by the defendant.

1. The defendant's counsel first contends that the demurrer to the indictment should have been sustained, for the reason that the indictment is a mere recital of evi-

dence, rather than a charge of any offense, and, to illustrate this, says that the indictment recites, among many other things, that on April 3, 1923, Nels Peterson executed three notes of $2,500 each, and a mortgage securing them, to the Nebraska State Savings Bank; that on April 16, 1923, one of the bonds was sold to Dailey, on April 27, 1923, another bond was sold to Dolezal, and on May 19, 1923, the third was sold to Thorson; that on June 14, 1927, Slama, executor, conveyed the Peterson land to the defendant; that April 1, 1928, the defendant extended the Peterson mortgage and gave new coupons to the original purchasers; that on September 26, 1928, the defendant conveyed the land to Pokorny; that on October 1, 1928, Pokorny gave four notes and mortgage to the Nebraska State Savings Bank for a total of $7,200; and the defendant then says that this indictment concludes with the following allegation:

"On or about the 11th day of October, 1928, said defendants, Wencel H. Kirchman, in the name of W. H. Kirchman, and Frank J. Kirchman, in the name of F. J. Kirchman, acting as officers of said banking corporation, *with the intent aforesaid,* and in the manner aforesaid, unlawfully, wilfully, fraudulently, feloniously, and falsely, did then and there, then and there being, execute a release of said mortgage for the sum of Seventy-Five Hundred Dollars ($7,500) discharging the same of record."

Defendant insists that this indictment charges an intent to defraud, on October 11, 1928, by the doing of certain acts performed in 1923, 1924, 1927, and 1928, the date of the commission of some of such acts being more than seven years prior to the return of the indictment, and more than five years prior to the date when it is charged that the crime was committed, and that these acts cannot be disregarded as surplusage, because "An allegation in an indictment descriptive of that which is essential to the charge therein made is a material allegation and cannot be rejected as surplusage." 14 R. C. L. 191, sec. 37. See *Goodlove v. State,* 82 Ohio St. 365, 19 Ann. Cas. 893, 30 L. R. A.

n. s. 134; *State v. Herrera*, 28 N. M. 155, 24 A. L. R. 1134.

"The accused may demur when the facts stated in the indictment do not constitute an offense punishable by the laws of this state, or when the intent is not alleged, when proof of it is necessary to make out the offense charged." Comp. St. 1929, sec. 29-1809.

The accused was entitled to a plain, concise statement of the charge against him. To allege every material fact leading up to the offense charged required in this case certain allegations, to which objections are laid. This indictment consists of about four typewritten pages, and sets out, in the greatest detail, each particular step, terminating with the signing of the release of the mortgage, which act it is charged he did, unlawfully, wilfully, fraudulently, feloniously, and falsely, with intent to defraud. We may grant that the recitations about the giving and recording of the mortgage years before, and the sale of the three $2,500 notes secured thereby, while not a part of the criminal act itself, yet laid the foundation therefor, and together formed the opportunity which he used, to the injury of others. But, is it not to the advantage of the defendant to have all of the facts leading up to the offense charged in minute detail? It is required that such necessary details be set out as will enable the court to pass on the question whether a criminal offense has been committed, and, on the other hand, the law requires that the defendant be informed of such facts as will clearly identify the entire transaction for which he is held to answer.

It may be admitted that perhaps some facts in this long indictment need not have been recited in such great detail; yet is this sufficient ground upon which to found a demand that this court reverse the conviction? "The law books are replete with cases in which defendants have gone free on the basis of some minor defect in the indictment." 9 Neb. Law Bulletin, 161. And our legislature has passed an act which will tend to avoid this happening in Nebraska: "No indictment shall be deemed invalid * * * for any other defect or imperfection which does not tend to the preju-

dice of the substantial rights of the defendant upon the merits." Comp. St. 1929, sec. 29-1501.

A patient study of this indictment and the briefs, together with each of the authorities cited, leads to no other conclusion but that the substantial rights of the defendant have not been prejudiced in this case by setting out in the indictment each and all of the preliminary details leading up to the criminal act charged therein.

2. The greater portion of the defendant's brief is devoted to an attack upon each of the 22 instructions given, and the error in refusing to give the 6 instructions offered by the defendant and refused by the court.

Instruction No. 2 sets out in four numbered paragraphs a concise statement of the material and essential elements of the crime charged, which the state must prove to warrant a conviction. Defendant then argues that there is no evidence showing that the defendant intended to or did defraud the Nebraska State Savings Bank, and says:

"The giving of an instruction which submits to the jury the existence or nonexistence of a fact material to the issues in the case on trial, when no evidence has been introduced which would support a finding of its existence, is error for which the judgment may be reversed." *Morearty v. State,* 46 Neb. 652.

The citation gives us an approved holding on the point there involved, yet let us examine the portion of the instruction as given which charges that the defendant "made such use of the said banking corporation with the intent * * * to injure and defraud said banking corporation, or with the intent * * * to injure and defraud Daniel Dailey, Frank Dolezal and Martin Thorson, or either of them." A careful reading of the instruction does not bear out the objection laid against it.

This court holds that it is considered better practice in a felony case to charge the jury, in concise and informal language, exactly what evidence is essential to authorize a conviction, rather than to copy the entire indictment into the instructions. *Dixon v. State,* 46 Neb. 298; *State*

v. Bater, 232 S. W. (Mo.) 1012. The court, in the case at bar, followed this approved practice, and we find no merit in the objections made thereto.

3. The defendant had submitted to the trial judge his requested instruction, No. 6, that where the defendant has introduced testimony tending to show his previous good reputation for being an honest, truthful and law-abiding citizen in the community in which he has lived, and continuing for about half a page, and terminating with: "It may be considered as tending to show that a person of good reputation would not be likely to commit the crime charged; to show that a person of good character and reputation is far less apt to commit crime than a person of bad character or reputation." In the place of this, the court gave instruction No. 12, which was about half as long. The defendant objects to the court's substituting its No. 12 for the offered instruction, No. 6, on the ground that instruction No. 6, offered, presented the good reputation of the defendant prior to the time the offense was committed, while the court's instruction presented an entirely different issue, the good character of the defendant *at the time of trial.* This court has carefully examined both of these instructions and does not find the error indicated in the one given by the trial judge.

Several approved instructions on good character, embracing practically the language used by the trial court, may be found in 1 Corcoran, Nebraska Instructions to Juries (2d ed.) 359-361. See *Strong v. State*, 106 Neb. 339; *Wakeley v. State*, 118 Neb. 346; *Linn v. United States*, 251 Fed. 476; 16 C. J. 981; *Latimer v. State*, 55 Neb. 609. It is a well-settled rule that it is not necessary to give an instruction in the exact language offered by counsel, where the same subject is adequately covered by instructions given by the trial court.

4. Instruction No. 13 is attacked for stating that evidence was introduced by both the state and the defendant in regard to his general reputation for truth and veracity, and the defendant insists that no one testified that the de-

fendant's reputation was good at the time of the trial, and that was not an issue in the case, and that the only evidence introduced by the defendant was as to his good reputation for being an honest and law-abiding citizen prior to the time the alleged offense was committed. It may be admitted that the instruction No. 13 could have been couched in more apt language, yet nothing therein given would mislead the jury. It was not error to call attention to the fact that "the defendant, Wencel H. Kirchman, in this case has availed himself of the right under the law to testify as a witness in his own behalf, and his credibility may be impeached the same as any witness." *Johnson v. State*, 34 Neb. 257; *Palmer v. State*, 70 Neb. 136; *Davis v. State*, 31 Neb. 247; *Philamalee v. State*, 58 Neb. 320.

5. Cautionary instructions. Instruction No. 20 was, in brief, that, although the members of the jury might sympathize with those who suffer, yet they were bound by their oaths to administer justice; that no question of misery, sentiment, or sympathy, or anything else, should reside with them; that they must be just to the state and equally just to the defendant. This instruction is attacked by the defendant as an unnecessary lecture to the jury. It is charged that it is an entirely uncalled for and unwarranted caution; that it scolds them about having any sympathy for the defendant; that, by referring to their oaths, and asking them to assist the court, it becomes "a patent intimation that the court's idea of justice in this case was a verdict of guilty."

In *Dinsmore v. State*, 61 Neb. 418, a cautionary instruction is set out in full, in which the members of the jury are told that they are "ministers of justice," and that "it is absolutely necessary and essential to the preservation of society that law should be enforced," and similar objections were made to it as are made in the present case; yet this court said it was merely a cautionary instruction, which the trial court may, in its discretion, give or not. See *Smith v. State*, 4 Neb. 277.

In the trial of felony cases, it may occur that unfairness

may arise in the final arguments of counsel; in other cases, in a crowded courtroom the feelings or desires of the audience may become manifest to the jury, and affect the jury to a greater or less extent in reaching a verdict. In such cases the trial judge may, and where there is a seeming necessity should, caution the jury to be governed by the evidence, and not to allow sympathy or prejudice to influence their verdict. *People v. Turner*, 265 Ill. 594, Ann. Cas. 1916A, 1062; *Preston v. Walker*, 26 Ia. 205, 96 Am. Dec. 140; *People v. Nunn*, 120 Mich. 530. It has been held proper to instruct each juror to bear in mind the obligation of his oath and that he should follow the guidance of his conscience. *Wimberly v. State*, 12 Ga. App. 540. And, on the other hand, it has been held that it is a mistake to give instructions which have a tendency to lessen the sense of the jury's responsibility. *Adams v. State*, 135 Ind. 571. "There is no merit in the assignment of error relating to the instruction impressing upon the jury the importance of the case to the state. The court was equally emphatic in stating its importance to defendant." *State v. Mueller*, 122 Minn. 91. To meet the necessities of such a situation in important felony trials, we find one instruction which has been given for years in many states, and was given in the case of *Ridings v. State*, 108 Neb. 804, and in many other cases, and, while not identical in every clause with instruction No. 20 in this case, it is very similar, and reads as follows:

"The duty of counsel and the court has now been performed. The counsel engaged in this case have been untiring in their efforts to bring before you all possible evidence that may aid you in arriving at the truth. They have ably assisted you in applying the evidence to the facts in dispute. The court has endeavored to rightly advise you in the law, and now there confronts you the final and important duty of pronouncing upon the guilt or innocence of the defendant. I submit this case to you with the confidence that you will faithfully discharge the grave duty resting upon you without, upon the one hand, being

moved by any undue demand for conviction on the part of counsel for the state, or being swayed from its right performance by any undue appeal to your sympathies. You will bear in mind that the liberty of the accused may neither be trifled away, nor taken by careless or inconsiderate judgment. But if, after a careful consideration of the law and the evidence in the case, you are satisfied beyond a reasonable doubt that the defendant is guilty, you should return your verdict accordingly. You must be just to the defendant and equally just to the state. As manly, upright men, charged with the responsible duty of assisting the court in the administration of justice, you will put aside all sympathy and sentiment, all consideration of public approval or disapproval, and look steadfastly and alone to the law and evidence in the case, and return into court such a verdict as is warranted thereby." (Transcript, p. 37.) See *Hinshaw v. State*, 147 Ind. 334.

This court has carefully examined each of the other alleged errors presented for a reversal of this case, and does not find error therein, including the errors alleged in sustaining a motion to strike out certain evidence several days after it was admitted. The defendant insists that this establishes a bad precedent, and in effect makes a new rule, which would read about as follows: Allow an attorney to "get all you can on the examination of your own witness and before you rest your case have the court strike out that which does not serve your purposes."

His proposition of law No. 11 reads as follows: "Several days after a state's witness had left the stand the court sustained a motion of the prosecutor, made at the time he rested his case, to strike as not responsive an answer of the witness given on his direct examination and which was material to the inquiry. This was prejudicial error."

I Wigmore, Evidence (2d ed.) sec. 19, says: "An objecting opponent is not entitled to treat a ruling as final, and therefore he cannot complain of a subsequent revocation of a ruling, merely in so far as the temporary ad-

mission of inadmissible evidence against his objection may obtain consideration for it in the minds of the jurors; for the instruction which will accompany the subsequent striking out of the evidence must be supposed to be obeyed by the jurors; except in extreme cases which obviously call for a stricter treatment."

In a recent civil case, this court condemned the acts of the defendants, who thrust aside both the letter and the spirit of our banking laws, and, with a reckless disregard of the rights of others, engaged in a course of conduct relative to the affairs of the Burton State Bank, the inevitable result of which was the ruination of the bank and disaster to others. *Kienke v. Kirsch*, 121 Neb. 688.

In a well-written article, telling why Nebraska should adopt the model code of criminal procedure prepared by the American Law Institute, found in 9 Neb. Law Bulletin, 146, is quoted the statement from President Hoover's inaugural address, as follows: "Every student of our law enforcement knows full well that it is in need of vigorous reorganization; that its procedure unduly favors the criminal. * * * In our desire to be merciful the pendulum has swung in favor of the prisoner and far away from the protection of society." Nebraska lawmakers have given to this court a provision which clearly provides: "No judgment shall be set aside, or new trial granted, or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." Comp. St. 1929, sec. 29-2308.

In the case on trial, the defendant admits that he signed the release of this mortgage, but argues that, as he did not read it, and simply signed his name to the release on the line indicated by a relative, he should not be responsible for this act. If pulling the trigger of a supposedly unloaded gun kills, can the actor avoid punishment? No.

The jury patiently listened to the evidence introduced for days, and heard the defense offered by the defendant, and held him to be guilty as charged. This court, finding no error in the record of the trial court, hereby affirms the same.

AFFIRMED.

GOOD, J., not participating.

MARGARET HALL, APPELLEE, V. CITIZENS STATE BANK OF SUPERIOR, APPELLANT.

FILED FEBRUARY 25, 1932. No. 27977.

1. **Banks and Banking: INSOLVENCY: TRUST FUNDS: INTEREST.** An order of court establishing a trust fund in a sum certain, entitled to priority of payment from the assets of a failed bank before the claims of depositors and creditors are paid, bears interest at 7 per cent. from the date of the decree until paid. Comp. St. 1929, sec. 45-103.
2. ———: ———: ———: ———. The interest thus accrued is payable in full from the assets of the bank in preference over the claims of depositors and creditors.

APPEAL from the district court for Nuckolls county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

F. C. Radke, Barlow Nye, W. A. Crossland and *I. D. Beynon,* for appellant.

Bernard McNeny, J. S. Gilham and *L. A. Sprague, contra.*

Heard before ROSE, GOOD and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

CHAPPELL, District Judge.

The Citizens State Bank of Superior, Nebraska, was closed by the department of trade and commerce of Nebraska on December 28, 1928, and placed in receivership on June 28, 1929. The appellee, Margaret Hall, filed her claim for a trust fund payable in full out of the assets of this bank. On November 7, 1929, the district court for Nuckolls county, Nebraska, decreed her a trust fund in

the sum of $5,630.47, entitled to priority of payment out of the assets of said bank ahead of the claims of depositors and creditors. The decree was silent as to interest. Upon appeal to the supreme court of Nebraska the decree of the district court was affirmed and mandate handed down on January 10, 1931. The receiver thereupon paid to the clerk of the district court for Nuckolls county the said sum of $5,630.47 in compliance with decree and mandate. Thereafter the appellee filed a motion in the district court for Nuckolls county for an order allowing interest on said decree from November 7, 1929, the date of the rendition, to January 17, 1931, the date of payment, in the sum of $470.73. Motion of appellee was sustained and the district court decreed that she have and recover the sum of $470.73 as interest on said judgment and that the same be paid by the receiver as a trust fund out of any assets of the Citizens State Bank of Superior, Nebraska, and prior to the claims of depositors. The receiver excepted to this decree and leave was granted to appeal to this court.

The errors relied upon for reversal are: (1) The decree is contrary to law; and (2) the decree is inequitable.

Appellant contends that the allowance of a claim for a trust fund is not a decree and judgment for the payment of money, but that it is a judgment for the recovery of property, and as such not within the statute imposing interest upon decrees and judgments, for the payment of money; and that if such interest is allowable it is not payable in full from the assets of the bank in preference over the claims of depositors and creditors. Appellant relies upon the case of *Gering v. Buerstetta,* 118 Neb. 54, and many well-reasoned cases from other jurisdictions. After a careful study of the cases cited, this court believes that they are distinguishable from the present case and not controlling because of our statute and the former holdings of this court. In the case of *Gering v. Buerstetta, supra,* the court passed only upon the question of whether interest was recoverable in that particular case up to the

date of the judgment, and not thereafter. In paragraph 2 of the syllabus the court said: "Under the facts in this case, claimants are not entitled to interest on and after December 14, 1926." In the opinion the court said: "The judgment that was entered in the district court allowed claimants the recovery of interest at 7 per cent. per annum from December 13, 1926. This was error. Claimants are not entitled to interest under the facts in this case in this proceeding."

In other Nebraska cases, *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786, *Capital Nat. Bank v. Genesee Fruit Co.*, 49 Neb. 793, *Capital Nat. Bank v. Cupples Woodenware Co.*, 49 Neb. 794, *Capital Nat. Bank v. Magoon*, 49 Neb. 795, *Capital Nat. Bank v. First Nat. Bank of Cadiz*, 49 Neb. 795, and *Higgins v. Hayden*, 53 Neb. 61, this court permitted the recovery of interest upon a trust fund with respect to which the bank had but a single duty to perform, that is, to deliver it to the party thereto entitled, up to the date of the judgment. In *Capital Nat. Bank v. Coldwater Nat. Bank, supra*, this court said: "The judgment of the district court required the payment of interest on the sum which the receiver was thereby adjudged to pay to the defendant in error. It is argued that as its claim is for specific moneys deposited, the relief must be limited to that sum, and that therefore no interest was allowable. It is probably true that this result would follow in the absence of a controlling statute, but this we need not consider, for it is provided in chapter 44 of the Compiled Statutes (Comp. St. 1929, sec. 45-104) that interest shall be at the rate of seven dollars for each one hundred dollars, annually, 'on money received to the use of another and retained without the owner's consent, express or implied.' The rate of interest fixed by the district court was conformable to this legislative enactment and was, therefore, proper."

In *Higgins v. Hayden, supra*, this court said: "Finally it is contended that the district court erred in allowing interest under the circumstances. In the absence of

statute this contention would have much force, but the point has heretofore been determined adversely to the defendant upon a construction of our statute. Comp. St. ch. 44, sec. 4; *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786."

This court has never directly passed upon the question whether a trust fund established by the district court is a decree and judgment for the payment of money coming within the provisions of section 45-103, Comp. St. 1929, which reads: "Interest on all decrees and judgments for the payment of money shall be from the date of the rendition thereof at the rate of seven dollars upon each one hundred dollars annually until the same shall be paid." However, there are Nebraska cases indicating that the establishment of a trust fund was in the nature of a judgment coming within the provisions of the last above section. Appellee cites and relies upon the cases of *State v. Farmers State Bank*, 113 Neb. 679, and *State v. Nebraska State Bank*, 118 Neb. 660. These actions were to establish claims against the guaranty fund. In *State v. Nebraska State Bank, supra*, this court said:

"One further question remains to be considered, viz.: Is the depositors' guaranty fund chargeable with interest on the claim at 7 per cent. from the date of its allowance by the district court? In several cases we have held that the allowance of the claim amounted to a judgment and came under the general provision of the statute that judgments shall draw interest at 7 per cent. It is contended by counsel for receiver that these decisions were rendered at a time when the guaranty fund was solvent and able to pay all claims certified to it under the law, but that at the time of the trial there were approximately $7,000,000 in claims certified for payment and unpaid because there were no funds in the depositors' guaranty fund to pay the same; and, further, that the maximum assessment authorized by law at that time in any one year was $1,650,000. Evidence of these facts appears of record. Attention is also called to the fact that by section 8028,

Comp. St. 1922, as amended by section 26, ch. 191, Laws 1923, the maximum assessment for replenishing the fund is one-half of 1 per cent. of the average daily deposits of banks, whereas prior thereto the assessment permitted was 1 per cent. of the average daily deposits. It is therefrom argued that, inasmuch as the delay in payment of the deposits is attributable to the law itself, no interest should be allowed.

"The argument *ab inconvenienti* is of considerable force and its rejection results in leaving the guaranty fund charged with a burden of staggering weight, but we would not be justified in relieving it unless in accordance with legal principles applicable to the facts of the case. As above noted, we have held in a number of cases that upon the allowance of the claim it draws interest at 7 per cent. per annum until paid. Among these cases may be cited: *State v. Farmers State Bank*, 113 Neb. 679, *State v. Octavia State Bank*, 116 Neb. 825, and three cases of *State v. Security State Bank*, 116 Neb. 521, 526, and 530, in which claims were allowed 'with interest as provided by law.' The question now presented was not discussed in any of those cases, but the principle upon which the holdings are based is that the allowance of the claim is in the nature of a judgment and is therefore within the operation of section 2836, Comp. St. 1922, providing that judgments shall bear interest at 7 per cent. unless a greater rate is provided for in the contract upon which it is based."

In the case of *Trompen v. Hammond*, 61 Neb. 446, citing this statute, this court said: "This section, it seems to us, admits of but one construction. It provides, in terms too plain to be misunderstood, that all judgments and decrees for the payment of money shall bear interest from the date of rendition to the date of payment." Likewise, in *Stuart v. Burcham*, 62 Neb. 84, this court said: "A defendant in a suit to which all the claimants of a fund in his hands are parties, who, being ordered by the decree to pay the fund into court, excepts to such decree and participates in an appeal therefrom by one of the

claimants, cannot be heard to claim, after affirmance of the decree, that he was a mere stakeholder and therefore is not chargeable with interest."

In *Johnson v. Farmers Bank*, 223 Mo. App. 513, a recent Missouri case similar to the case at bar and involving the same questions, the court said: "Under Revised Statutes 1919, section 6493, providing for interest on all money due on a judgment or order, judgment for amount of preferred claim against bank in liquidation under sections 11673-11726, properly provided for interest from date of its rendition." In the opinion the court said: "Contention is made that the court erred in allowing interest on the judgment from the date of its rendition. It is argued that the scheme for administration of insolvent banks is provided by article 1, chapter 108, of the Revised Statutes of Missouri 1919, and contemplates an equitable distribution of the assets of insolvent banks among all of the creditors, and as no provision is made for the allowance of interest, the court erred in allowing it. No authority is cited in support of this contention. Section 6493 of the General Statutes of Missouri 1919, provides that interest shall be allowed on all money due upon any judgment or order of any court, from the day of rendering the same until satisfaction be made by payment, accord or sale of property. This statute is general in its application to all judgments or orders of any court. We see no reason why it would not apply to the judgment rendered in this case, especially so, in the absence of any prohibition in the statutes which govern the liquidation of insolvent banks."

It has been said in other jurisdictions: "Interest is recoverable on judgments rendered against persons in their fiduciary capacities, and affecting the funds in their hands, as upon other judgments; and any proper order or decree of court requiring a fiduciary to make payment of funds in his hands is generally considered a judgment under statutes providing for interest to be recovered thereon." 33 C. J. 215, and cases cited.

This court has indicated and by the great weight of authorities it seems impossible to separate the judgment and interest accruing thereon. Such interest is a part of the judgment itself for which execution may issue upon request. In *State v. Nebraska State Bank, supra,* it is well said: "Interest accruing upon a bank deposit is a mere incident to the principal sum and a part of it, within the meaning of the bank guaranty act." In *Stuart v. Burcham, supra,* in the opinion, at page 87, this court said: "The three orders are in entire harmony; one directing the money to be held till further order, the next, furnishing such further order by directing it to be paid in; the next, granting an execution for the interest from the date at which he should have paid in, pursuant to the statute fixing interest on judgments." In *Calloway v. Doty,* 108 Neb. 319, 325, this court said: "When, therefore, the plaintiff applied to the clerk of the court for an execution for the unpaid balance due upon the judgment, it was not only proper for the clerk, but it was his duty, to ascertain from the record what rate of interest the amount of judgment bore and issue an execution accordingly." In *Evans v. Fisher,* 26 Mo. App. 541, under a statute substantially the same as ours, it was said: "The rate of interest which a judgment shall bear is a quality which the statute ascribes to the judgment, and it is not a necessary part of the judgment entry; and where it is not shown by the judgment entry, it is the duty of the clerk to ascertain from the record the interest which the judgment shall bear, and to issue execution accordingly; and where he refuses to perform his duty, the circuit court can direct him to do so on motion, or the defendant can compel him to do so by mandamus." See *State v. Vogel,* 14 Mo. App. 187. It has been said in other jurisdictions: "Where a statute states that judgments are to carry interest, such will be implied though the particular judgment was silent on the point. Even where, by agreement, execution is to be delayed, the judgment will bear interest, and it has always been held that the interest as an incident to a judgment

may be collected as long as the execution remains unsatisfied notwithstanding the payment of the amount of judgment." 15 R. C. L. 15, sec. 12, and cases cited. "At the present time, by force of statute in most jurisdictions, interest on judgments as a matter of right is allowed, and may be collected on execution. It has been said that interest is as distinctly a substantive part of the debt as if the obligation to pay was founded upon a contract for interest." 33 C. J. 213, and cases cited.

In the absence of any prohibition in the statutes governing the liquidation of insolvent banks, the allowance of a trust fund is a decree in the nature of a judgment for the payment of money and, therefore, within the provisions of section 45-103, Comp. St. 1929, and bears interest at the rate of 7 per cent. from the date of judgment until paid, and such accrued interest is a part of the judgment and payable in full from the assets of the bank in preference over the claims of depositors and creditors.

The judgment of the district court is

AFFIRMED.

HAARMANN VINEGAR & PICKLE COMPANY ET AL., APPELLEES, V. DOUGLAS COUNTY ET AL., APPELLANTS.

FILED FEBRUARY 25, 1932. No. 28066.

1. **Appeal: PLEADING: AMENDMENT.** Permission to amend a pleading is of no avail unless complied with; neither does it raise a presumption that the case proceeded to trial and judgment on the theory of a permissive amendment. *Ingram v. Bank of Commerce*, 114 Neb. 64.
2. **Taxation: ASSESSMENT.** K., the owner of a tract of land known as Iler Grand distillery tract, made a contract for sale of a part thereof described by metes and bounds to G. W. C. B. Co.; the contract was recorded in the miscellaneous record in the office of the register of deeds; a trust deed in the nature of a mortgage was executed by G. W. C. B. Co., and also recorded in the office of the register of deeds; no actual notice being given or facts brought to the attention of clerk or assessor indicating change of ownership. *Held*, that the continuing to list the tract described in the contract for assessment in the

name of K., and assessing it along with other land in the Iler Grand distillery tract, as one entire tract and at one aggregate amount, did not, under the circumstances of this action, render the entire tax based thereon void.

3. **Taxation**: VOLUNTARY PAYMENTS. Where, after sale had been held under a decree in a foreclosure case, and before confirmation, there was an agreement whereby a lienholder was permitted to take over the property involved, which he had acquired by assignments from others interested therein, and in consummation of such agreement the bid of the purchaser at said sale was handled by reimbursing him for the amount he had paid out up to that time on the property, which included certain taxes involved in the instant case, said payment or reimbursement of the bidder for taxes paid not being by virtue of any order or decree of court, the payment of such taxes was a voluntary payment.
4. ———: ———. The owner, on sale of real estate, which had been sold for nonpayment of taxes, agreed with the purchaser to pay the taxes for certain of the years included in the tax sale, and in consummation of the contract of sale permitted the purchaser to retain from the purchase price an amount sufficient to satisfy the tax lien for said years, the purchaser paying to the holder of the sale certificate the amount of the tax lien, and the certificate was thereupon surrendered to the county treasurer and canceled, the payment of such taxes by the owner in consummating the sale was a voluntary payment.
5. ———: ———: RECOVERY. Taxes not entirely void, though the assessment on which based was irregularly made, may not be recovered when voluntarily paid.
6. ———: VALIDITY. Where taxes are levied and computed on an amount in excess of actual assessed valuation of real property, such taxes are absolutely void so far as based on valuation in excess of actual assessed valuation.
7. ———: VOID TAXES: RECOVERY. If a tax has been levied that is absolutely void, and has been paid, though voluntarily, the amount thereof may be recovered in an action for that purpose.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed in part, and reversed in part.*

Henry J. Beal, John W. Yeager, John F. Moriarty and *T. J. O'Brien,* for appellants.

Hotz & Hotz and *Merrow & Murphy, contra.*

Heard before GOSS, C. J., EBERLY and PAINE, JJ., and BEGLEY and ELDRED, District Judges.

ELDRED, District Judge.

This is an action brought to recover a refund for certain taxes claimed to have been void and to have been involuntarily paid. The petition contains three causes of action. Haarmann Vinegar & Pickle Company was interested in the first cause of action only, and from the judgment entered on that cause of action, no appeal has been taken, and that company is no longer interested in the case. Cynthia M. Daniel, plaintiff and appellee, was alone interested in causes of action two and three, and from a judgment in her favor the county of Douglas, city of Omaha, and Otto J. Bauman as county treasurer and *ex officio* treasurer of the city of Omaha, defendants and appellants, have appealed.

By the second cause of action Cynthia M. Daniel, appellee, is seeking an accounting and refund of taxes she claims to have involuntarily paid on February 16, 1924, on the real estate involved in this action, in the sum of $3,344.43, being taxes of the city of Omaha for the years 1920, 1921, 1922, and 1923, with interest; and the further sum of $1,009.14, county taxes of Douglas county for the years 1919, 1920, 1921, and 1922, with interest.

Prior to December 16, 1918, the property in question was a part of a much larger tract, referred to as the Iler Grand distillery tract, located near Fourth and Pierce streets in Omaha, and owned by one Adolph L. Meyers. On that date Meyers entered into a contract with the Great Western Commercial Body Company for the sale of the specific part of said Iler Grand distillery tract in question, described by metes and bounds, and containing approximately 39,840 square feet, or 0.9146 acres. The contract was filed for record in the office of the register of deeds on the same date, and recorded in miscellaneous record. Meyers had a first lien upon the property for a balance due him on the purchase price. Appellee became the owner of a lien under a trust deed given by the Great

Western Commercial Body Company to the Omaha Safe Deposit Company. This trust deed likewise described the property by metes and bounds and was recorded in the office of the register of deeds August 10, 1920. During all the years covered by the second cause of action the irregular tract involved herein was assessed along with and as a part of the larger tract of said Meyers as one single entire tract, and taxes computed thereon in an aggregate amount. Foreclosure proceedings were instituted by Meyers, and appellee, with others, was made a party defendant. In the adjusting of the matters involved in that suit, plaintiff acquired the title and paid the taxes in controversy.

Appellee contends that all of the taxes were illegal and void, for the reason that the tract in controversy was assessed and taxed with property other than the property of the plaintiff as an entire tract, at one aggregate valuation, so that it was impossible to determine the amount of taxes for which her property was liable; and, further, that the payment was involuntary.

The district court found against the appellee and in favor of appellants as to county taxes for the years 1919 and 1920, and city taxes for the years 1920 and 1921; and as no cross-appeal has been taken, that part of the decree will not be farther considered.

As to the county taxes for the years 1921 and 1922, and city taxes for the years 1922 and 1923, the trial court sustained the contention of appellee, and entered judgment for a refund of all taxes paid for those years.

By the second cause of action of the petition, the appellee, one of the plaintiffs, claims to have been the owner of the property at the time of paying taxes, but makes no claim of having been a secondary lienholder, nor to having paid taxes to protect any lien held by her against the property. From the bill of exceptions it appears that, during the trial and after the evidence had all been introduced, plaintiff orally asked permission to amend causes of action two and three to conform to the proof, by plead-

ing in the second cause of action the facts as to a secondary lien; the manner in which title to the property was claimed to have been acquired through a foreclosure proceeding; the payment of the taxes by the purchaser at the sale, and redemption by her to protect her secondary lien. The bill of exceptions further discloses that the court, over the objection of the appellants, granted permission to make the amendment. No record of these proceedings nor any amendment appears in the transcript, and there is nothing in the record to indicate that any amendment was in fact made.

By the requested amendment the appellee's second cause of action would be founded upon a different set of facts and theory than originally relied upon. But no amendments having been made the case must be disposed of upon the issues made by the pleadings as embodied in the transcript. The court will not examine the bill of exceptions to determine issues upon which the case was tried. "Permission to amend a pleading is of no avail unless complied with; neither does it raise a presumption that the case proceeded to trial on the theory of the permissive amendment." *Ingram v. Bank of Commerce*, 114 Neb. 64.

According to the petition of the appellee she became the owner of the property February 11, 1924; the evidence supports that allegation. Appellee alleges that she paid the taxes in controversy February 16, 1924, the specific amounts being set out; and that she believed when said taxes were paid that they were due and legal taxes upon said property. It is further alleged in the petition that the property involved had been sold and conveyed by metes and bounds on numerous occasions, and that deeds were of record showing ownership of the tract in controversy to be separate and distinct from other surrounding properties; that the taxes paid covered other and additional property, and that said facts have recently come to light.

The taxes appear to have been paid by the plaintiff un-

der the following circumstances: Decree having been entered by the court in the foreclosure proceeding, the tract involved herein was sold by the sheriff under said decree on July 17, 1923, to one Cook, for the sum of $24,310, which bid included the amount of the first lien under the Meyers contract, and the county taxes for 1919, 1920, 1921, and 1922, and the city taxes for 1920, 1921, 1922, and 1923. It was stipulated on the trial, in substance, that J. Edgar Daniel filed a petition to set aside the sale, and on December 1, 1923, by agreement of parties, he was permitted to take over said property that he had acquired by the assignment of the interest of Adolph L. Meyers and others, and be substituted as party plaintiff; the bid of Cook being handled by Daniel reimbursing Cook for the amount paid out by him up to that time, Daniel directing the property transferred to his wife, the appellee, who furnished the funds therefor. The total amount of taxes thus paid for all years above mentioned aggregated the sum of $4,353.57. This is the substance of all the evidence bearing upon the disposal of the foreclosure proceeding and the acquiring of the title and payment of the taxes by plaintiff. It will be noted that the case was disposed of and taxes paid pursuant to some agreement between the parties, and not on any order or decree of the court. Appellee does not contend in her petition that the taxes were void, but prays for an accounting and recovery of excess amounts paid by her. The trial court sustained the contention of the appellee and found that taxes for 1921 and 1922, county, and 1922 and 1923, city, were entirely void.

The only evidence to support the allegation that the property had been sold and conveyed by descriptions set out, and that deeds were of record showing separate ownership, was the recording of the contract between Meyers and the Great Western Commercial Body Company, which was recorded in the miscellaneous record of the office of the register of deeds, and not in the deed record; and the trust deed from the latter company to the Omaha

Safe Deposit Company, being in effect a mortgage. The contract was not offered in evidence, and the stipulation does not cover its terms and conditions, nor disclose what particular interest or right was conveyed or acquired thereby. There is some claim that the attention of the assessor and county treasurer were directed to the sale of the tract in controversy through certain letters written by the attorney for appellee; but all those letters were written long after the assessments in question were made. So, the question is: Did the failure to have the property involved separately listed and assessed for taxation, under the issues and the evidence in this case, render the entire tax void? The statute appears to contemplate that real estate should be separately listed and assessed for taxation in the name of the owner, as far as the clerk shall be able to ascertain the same. Comp. St. 1929, sec. 77-1602.

There being no deed of record describing the specific tract involved, and no evidence of any notice of sale or request made to have the tract separately listed and assessed, we conclude that the failure of the clerk to separately list the tract, or the assessor to value it as a separate tract, did not render the entire tax void. At most, it was an irregularity only. *Carman v. Harris,* 61 Neb. 635, 645. It did not devolve upon the clerk in making up the list of owners of real estate for assessment purposes to examine miscellaneous records or records of mortgages or trust deeds and determine the legal effect of such instruments, or in whom ownership of property was vested. The interests of the parties under such circumstances are protected by the provisions of section 77-1903, Comp. St. 1929, providing that "the treasurer shall receive taxes on part of any lot, piece or parcel of land charged with taxes, when a particular specification of the tract is furnished." It is evident from the testimony of the witnesses that the tract could be divided and the taxes assessed proportioned thereon, and that it was in fact so handled later, and before taxes for 1924, county, and 1925, city, involved in the third cause of action, were assessed and levied.

The taxes not being void, but at most irregularly assessed, appellee having paid the same without protest, in consummation of an agreement for the purchase of the property, such payment constitutes a voluntary payment, and she is not entitled to a refund therefor. The decree of this court is therefore in favor of the defendants, appellants, as to the second cause of action.

The appellee alleges in her third cause of action that on or about the 1st day of January, 1927, she transferred the property in controversy to the Haarmann Vinegar & Pickle Company under an agreement whereby she was to pay the 1923 and 1924 county taxes, and the 1924 and 1925 city taxes; that in pursuance of such agreement the company withheld the sum of $3,033.37 to cover the taxes upon the property for said years, and interest, on the basis of a statement rendered by defendant treasurer; that she believed at that time that the statement as to said taxes was right, but now discovers it was erroneous. She alleges further that under the date of February 23, 1924, she furnished a plat and description of the property in controversy to the county treasurer, and under date of February 22, 1924, a like description to the county assessor, and that on a number of other dates set out, all subsequent to the dates above mentioned, she directed the attention of the taxing authorities to the specific description of the property involved, then owned by her, but that nevertheless no information was given appellee which would enable her to pay taxes upon her property.

It is further alleged that the assessed valuation of the property involved herein in the year 1924 was $22,300, but that the taxes were based upon an erroneous assessed valuation of $46,750, which it is alleged was the basis of the taxes which were withheld by the Haarmann Vinegar & Pickle Company for taxes for the years mentioned; and therefore the sum withheld from her, to wit, $3,033.37, is in error; that she is entitled to a refund from other parties to the action, and offered by said petition to pay county taxes for the years 1923 and 1924, and city taxes

for 1924 and 1925, based upon the valuation of $22,300, instead of a valuation of $46,750; that the defendant, Omaha Trust Company, is the owner and holder of a tax sale certificate upon said property based upon a valuation of $46,750. Appellee prays for an accounting.

The court found that as to the 1923, county, and 1924, city, the taxes were based upon an erroneous assessment, in that the property was intermingled with other property as one tract, and that there was no basis from which the court could determine what the assessment should have been for the 1923, county, and 1924, city, and found that the county tax for said year 1923, and 1924 city tax were entirely void, and that the appellee was entitled to recover the amount thereof with interest.

All that has been previously said in considering the second cause of action, regarding any conveyance of the property, the recording of instruments and the manner of assessing property, is equally applicable to the taxes, 1923, county, and 1924, city, involved in this cause of action. No additional notice to taxing authorities of any change of ownership appears. The notice of change of interest or of ownership given by the letters referred to were all after the assessment on which the 1923, county, and 1924, city, taxes were computed, must have been made. The tract appears to have been divided and property separately listed and assessed for the tax year following. The only difference as to the situation relative to taxes involved in the second cause of action, and taxes, 1923, county, and 1924, city, in the third cause of action, is as to the manner in which payment was brought about. In the second cause of action the payment of the taxes was made, as heretofore shown, in consummation of an agreement for the purchase of the property; while, in the last mentioned cause, appellee was selling property to the Haarmann Vinegar & Pickle Company; she agreed to pay the taxes for the years involved, and permitted the purchaser to retain the amount necessary for that purpose; that company paid the amount retained to the Omaha Trust Company, the

holder of the tax sale certificate, and the certificate was surrendered to the county treasurer for cancelation. This was a voluntary payment. The tax for 1923, county, and 1924, city, not being void, but at most based on an irregular assessment, and being voluntarily paid, the appellee is not entitled to a refund therefor. The decree of this court on the third cause of action as to the 1923 county and 1924 city tax is in favor of the defendants, appellants.

As to the remaining taxes involved in the third cause of action, that is 1924, county, and 1925, city, it appears that the actual assessed valuation upon which these taxes should have been computed was $22,250, according to the records of the board of equalization; but the taxes for 1924, county, and 1925, city, were in fact computed on the basis of an assessed valuation of $46,750, and entered upon the treasurer's book for collection, and later the real estate was sold at tax sale for said taxes so erroneously computed on a valuation of $46,750 to the Omaha Trust Company. Computed upon such erroneous valuation of $46,750, instead of $22,250, the county taxes for 1924 amounted to $275.49, and should have amounted to only $128.47, the difference on the county tax being $147.02; the city tax for 1925 amounted to $1,163.53, and should have amounted to only $550.05, the difference on the city tax being $613.48. This was the finding of the trial court, and it is likewise the finding of this court.

How the error was made in computing taxes on the wrong amount as assessed valuation does not satisfactorily appear, and it is not material. There was no foundation for the assessment and levy of taxes on any valuation in excess of $22,250, and all such excess taxes are wholly void. *Farmers Co-operative Creamery & Supply Co. v. McDonald*, 100 Neb. 33. If a tax has been levied that is absolutely void, and has been paid, though voluntarily, the amount thereof may be recovered with interest in an action for that purpose. *Wilson v. Butler County*, 26 Neb. 676.

The property of appellee was sold for the void tax, and

the appellants county and city received it from the tax sale purchaser; the appellee furnished the funds used to reimburse the tax sale purchaser, and secure the possession of the certificate and cancelation of said tax, and is entitled to recover the amount thereof from the appellants county and city. The decree of the district court as to this item was that the appellee, Cynthia M. Daniel, recover from the county of Douglas the sum of $147.02, with 6 per cent. interest from November 3, 1926, and from the city of Omaha the sum of $613.48, with 6 per cent. interest from November 3, 1926. The decree of the district court as to the second cause of action and as to the claim for county tax, 1923, and city tax, 1924, involved in the third cause of action reversed and case dismissed as to all of such items. Decree of the district court as to county tax, 1924, and city tax, 1925, affirmed. Each party to pay own costs on this appeal.

AFFIRMED IN PART, AND REVERSED IN PART.

GERTRUDE EBERS, APPELLANT, V. ROGER C. WHITMORE ET AL., APPELLEES.

FILED FEBRUARY 25, 1932. No. 27981.

1. **Automobiles**: USE BY EMPLOYEE: PRESUMPTION: REBUTTAL. In absence of evidence to the contrary, it will be presumed that an automobile in charge of its owner's employee is in the service of such owner, but such presumption vanishes when rebutted by evidence that is clear and undisputed.
2. ———: ———: COLLISION: LIABILITY. Defendant, owner of a garage, loaned his truck to an employee to go to his home, seven blocks south of the garage, for the purpose of getting his lunch; after lunch the employee drove three blocks west from his home and twenty blocks north to get his watch which had been left at a jewelry store for repairs; while returning, and when ten blocks north of the garage, a collision occurred between the truck and another automobile at a street intersection. *Held*, that the truck was not being used in the service of the owner at the time of the accident, but by an employee for his own personal convenience, and that the evidence does not bring the case within the rule announced in *Keebler v. Harris*, 120 Neb. 739.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Baylor & Tou Velle and *George A. Healey*, for appellant.

Hall, Cline & Williams and *H. W. Baird, contra.*

Heard before ROSE, GOOD, DAY and PAINE, JJ., and LESLIE, District Judge.

LESLIE, District Judge.

This action is brought by the plaintiff against the defendants for the recovery of damages for personal injuries resulting from a collision between the automobile in which plaintiff was riding and a truck driven by defendant Geiger, but owned by defendant Whitmore, on the 4th day of June, 1930, at or near the intersection of B and Fourteenth streets, Lincoln. An extensive statement of the allegations of the amended petition and the answers of the defendants is not necessary. It is sufficient to state that defendant Whitmore, owner of the truck driven by Geiger, admitted the ownership of it and that a collision occurred on the date in question, but expressly denied in his answer that at the time of the collision the defendant Geiger was using the truck in his, Whitmore's, service. At the conclusion of the evidence the jury were instructed to return a verdict for the defendant Whitmore; the case was submitted to the jury as to the liability of Geiger, and they returned a verdict against such defendant.

The plaintiff appealed from the judgment of the trial court in sustaining the motion of defendant Whitmore for a directed verdict. This being the only question for our consideration, it is necessary to consider the evidence only in so far as it relates to whether the truck was in the service of Whitmore at the time of the accident.

Whitmore was operating a garage in Lincoln on Fourteenth street a little south of South street, and defendant Geiger was employed by him as a helper. On the day in question the family car that usually called to take Geiger to his lunch did not arrive and he used Whitmore's truck

for the purpose of going to his home at Thirteenth and Otoe streets for his noon meal. In relation to this Whitmore testified: "He (Geiger) was waiting for his mother to come * * * and take him to lunch, so I told him to take the truck and get his dinner and get back as quick as he could." This evidence is undisputed as to the circumstances under which the truck was taken from the garage. Geiger's home at Thirteenth and Otoe streets is approximately seven blocks south and one block west of defendant Whitmore's garage. The scene of the accident is approximately ten blocks north of the garage. After having his lunch, Geiger drove from his home, seven blocks south of the garage, to Parke-Brown's jewelry store on Tenth street north of O, twenty-two blocks north of the garage, to get a watch he had left for repair. Geiger's testimony is that he drove from there north on Tenth to P street, east on P street to Fourteenth, south on Fourteenth to B street, where the collision occurred.

It is plaintiff's contention that, when Whitmore gave Geiger permission to take the truck to his home with instructions to return it after lunch, the truck was in the service of Whitmore, and, conceding that Geiger was using it for his own personal convenience while going from his home to the jewelry store on Tenth street, when he turned to go from there to the garage he was operating the truck in the service of the owner within the rule announced in *Keebler v. Harris*, 120 Neb. 739. We cannot assent to this. In *Keebler v. Harris*, defendant Harris was an employee of codefendant American Credit Corporation, and had been directed by his employer to repossess a certain Ford car and take it to a garage at 610 South Fifteenth street, Omaha. From his home, Fifty-second and Izard streets, he drove his father's car to 915 South Forty-eighth street, where he took possession of the car. He then returned his father's car to Fifty-second and Izard streets; the repossessed car, driven by another boy, following him. After leaving his father's house, Harris took the repossessed car and drove to several places in Omaha to make

collections that he was authorized to make for the defendant credit corporation, eventually returning to Forty-ninth and Dodge streets, from which point he started to take the repossessed car to the garage to which he had been directed to take it, on Fifteenth street. The accident occurred at Forty-sixth and Farnam streets, two blocks south and three blocks east of Forty-ninth and Dodge, and on one of two routes that would usually be taken in going from Forty-ninth and Dodge streets to Fifteenth street. This court held that Harris was in the zone of his general duties, and that if he had, earlier in the evening, temporarily abandoned his employment for his own convenience, he resumed his duties when he started to go to the garage from Forty-ninth and Dodge streets. In the instant case the defendant Whitmore loaned his truck to Geiger for his own personal use, with no directions other than to return as soon as he could. The exact language used by Whitmore is not material so long as it definitely appears that Geiger was to perform no service for Whitmore during the time he was out with the truck. There is no conflict in the evidence that Geiger was driving the truck on an errand personal to himself. By no stretch of imagination can it be said from the record that he intended to perform, was directed to, or, in fact, did perform any service for his employer while he was out with the truck.

The plaintiff urges, however, that, since it is conceded that Whitmore was the owner of the truck and Geiger was employed by him and frequently used the truck on the streets in the vicinity of where the accident occurred, he is presumed to have been using it on this occasion in the service of his employer, and that this presumption is evidence that would sustain a verdict for plaintiff. Our attention is called to cases that support this contention: *Williams v. Ludwig Floral Co.*, 252 Pa. St. 140; *Holzheimer v. Lit Bros.*, 262 Pa. St. 150; *Randolph v. Hunt*, 41 Cal. App. 739; *Ward v. Teller Reservoir & Irrigation Co.*, 60 Colo. 47. The great weight of authority, however, is to the contrary, and the decisions of this court are in accord

with those cases which hold that a presumption is not evidence and will not prevent a directed verdict when the evidence rebutting it is convincing and undisputed. In the instant case the presumption arose from the facts alone that Whitmore was the owner of the truck and Geiger was employed by him. This established *prima facie* that the truck was in the service of the owner. The presumption is unsupported by circumstancial evidence. It was rebutted by the testimony of witnesses who knew the facts. This extinguished the presumption. *Eckman Chemical Co. v. Chicago & N. W. R. Co.*, 107 Neb. 268; *Sorensen v. Selden-Breck Construction Co.*, 98 Neb. 689. Plaintiff's contention in a sense would extend the family automobile doctrine to employees. In *Mogle v. A. W. Scott Co.*, 144 Minn. 173, the court said:

"We are now asked to extend the (family automobile) doctrine to cases where an employer permits a favored employee to use, for his own pleasure, an automobile kept and ordinarily used in carrying on the employer's business. * * * If we were to hold as requested, it would tend to put an end to the praiseworthy custom of many employers who permit faithful employees to use occasionally, for their personal enjoyment, automobiles kept and ordinarily used in carrying on the employer's business. * * * But, aside from this particular consideration, we think both reason and authority are opposed to plaintiff's contention. The extension of the family automobile doctrine to other relationship cannot well be justified upon any principle of the law of master and servant or principal and agent. The owner of an automobile, who loans it to another to use for purposes personal to the borrower, is neither master nor principal, but merely a bailor, and in law is not chargeable with the consequences of the borrower's negligence while pursuing his own ends in his own way."

There being no controverted questions of fact to go to the jury, the court properly directed a verdict for the defendant Whitmore.

The judgment of the trial court should be, and is,

AFFIRMED.

CITIZENS NATIONAL BANK V. ROSE POLSKI, APPELLEE: CLARENCE G. BLISS, RECEIVER, APPELLANT.

FILED MARCH 2, 1932. No. 28126.

1. **Contracts: PUBLIC POLICY.** When a contract has been executed in consideration of an agreement not to prosecute criminally, the general rule is that no action lies to recover property delivered under its terms. The court will leave the parties in the same position in which it finds them.
2. ———: **DURESS.** When such an agreement has been obtained by duress, it may be avoided by the party against whom the duress is exercised.
3. **Equity: PUBLIC POLICY.** "The equitable principle expressed in the maxim, 'He who comes into equity must come with clean hands,' being founded on public policy, public policy may require its relaxation or limitation. Even when the parties have been found to be *in pari delicto*, relief has at times been awarded on the ground that in the particular case public policy has been deemed to be best conserved by that course." *Weaverling v. McLennan*, 116 Neb. 466.
4. ———. "Where equity has assumed to act, it must do complete justice, regardless of whether litigants originally came into court with unclean hands." *Weaverling v. McLennan*, 116 Neb. 466.

APPEAL from the district court for Howard county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Lamont L. Stephens and *F. C. Radke*, for appellant.

George I. Craven, contra.

Heard before GOSS, C. J., DEAN and PAINE, JJ., and BROADY and RHOADES, District Judges.

GOSS, C. J.

The Citizens National Bank filed its petition in equity in August, 1930, interpleading Rose Polski as one claiming the proceeds of a four months' time certificate of deposit in plaintiff bank, dated April 1, 1930, for $3,750, bearing 4 per cent. interest, and Clarence G. Bliss, Receiver of Bank of Ashton, as another party claiming such proceeds. Plaintiff asked to be permitted to deposit the principal and interest thereon for four months with the

clerk of the court, that said claimants be required to litigate their respective claims, and that plaintiff be discharged upon paying such principal and interest. Issues were joined and trial was had. On August 5, 1931, the court entered a decree finding generally in favor of Mrs. Polski and awarding her the proceeds of the certificate. The receiver appealed.

Bank of Ashton had long been a state bank owned and operated by the Polski family. For some years Stephen S. Polski had been president and managing officer. On November 24, 1929, he died. The bank was closed the next day with heavy liabilities. The evidence suggests misapplication of funds of the bank and of bonds left with the bank for safe-keeping. Polski left considerable insurance, part of which was payable to the bank and part to his wife, Rose Polski. She deposited $3,750 in the plaintiff bank and received the certificate of deposit therefor. On June 7, 1930, she indorsed the certificate at her home and it was turned in to the receiver through his assistant, who was present when it was indorsed by Mrs. Polski. At the time she indorsed the certificate it was agreed between the assistant receiver and her that the department of trade and commerce and the receiver would stay prosecution of the officers of the bank or would return the certificate. The assistant to the receiver gave her a written memorandum to that effect. It is in evidence. Mrs. Polski naturally wanted to lighten the obloquy on the family name of her husband and to protect her brothers-in-law, George L. Polski, a director and vice-president of the bank, and Ignac M. Polski, cashier of the bank, who had not only civil liability to the bank but who had reason to fear criminal prosecution. George L. Polski and C. E. Brown, assistant to the receiver, went to the home of Rose Polski on June 7, 1930, on a joint venture. They knew Mrs. Polski had funds. Polski wished to borrow from her and Brown desired him to do so in order that George might pay the bank. They had virtually an all-day session. Mrs. Polski called in her brother-

in-law, Garrett H. Lorenz, as her adviser. Ultimately, on that day, she turned over to George L. Polski, among other securities totaling $9,950, the certificate of deposit, indorsing her name on the back of it. It was understood he would turn it over to the receiver, which he did soon thereafter by delivering it to Brown, assistant to the receiver. Brown duly indorsed it to Bliss, receiver, who is here claiming the proceeds. Brown signed in ink and delivered to Rose Polski a statement in these words: "If in any case the dept. of trade and commerce or the receiver of the Bank of Ashton should not see fit to accept moneys tendered by Rose Polski to stay prosecution of the officers of the Bank of Ashton, that such certificate of deposit or moneys shall be returned to her. (Signed) C. E. Brown, Asst to Receiver of Bank of Ashton." It is evident the threat of prosecution was the potent influence in obtaining from Mrs. Polski this certificate as the fruit of the day's work.

Mrs. Polski received from George on June 7, 1930, his two notes—one for $4,666 (signed also by L. B. Polski) due June 7, 1935, and one for $5,000, due June 7, 1940. George gave her a memorandum listing the securities, totaling $9,950, and the notes, and showing the balance due Rose Polski to be $284. During the trial Mrs. Polski tendered in court the notes and offered to surrender them to the receiver or to the makers. The receiver declined the tender.

Among other things, Rose Polski had pleaded duress on the part of Brown in procuring her to indorse and deliver the certificate. By its decree the court found generally in favor of Rose Polski on all the issues, "save and except that the court fails to find that any duress was exercised or used in obtaining the transfer of the certificate," etc.; found that the consideration was the agreement not to prosecute, and that such an agreement is illegal and void, but that she "was an ignorant woman and not acquainted with the provisions of law relative to compounding a felony," was constrained by over-persuasion of Brown and

George L. Polski, and was not equally guilty with Brown. Therefore, the court declared her indorsement and delivery of the certificate void and decreed payment of the proceeds to her.

In *Johnson v. Owen*, 72 Neb. 477, it appears that Charles Owen was complained of on the charge of rape. He left the state, but his father, Frank Owen, indorsed and delivered a $300 certificate of deposit to the county attorney on condition that the prosecution would be dismissed. The county attorney indorsed and delivered the certificate to the county judge. Charles Owen replevied it. The judgment in favor of Charles Owen was reversed, the court holding: "Where a plaintiff claims that a certificate of deposit in the sum of $300 was indorsed and delivered for him to a county attorney under an agreement that, in consideration thereof, he would dismiss a criminal prosecution against plaintiff and release him from jail, a court will not aid him to regain possession of the property. Such a contract or agreement is illegal, against good morals and public policy, and the court will leave the parties in the same position in which it finds them." Trending the same way but on facts not so similar are *Brower v. Fass*, 60 Neb. 590; *Davis v. Hinman*, 73 Neb. 850; *Perry v. Berger*, 85 Neb. 753; *Clarke v. Omaha & S. W. R. Co.*, 5 Neb. 314. This may be said to be the general rule. We note that *Johnson v. Owen, supra*, was an action at law and not in equity, that the opinion rejected Owen's argument that the certificate of deposit was obtained by duress; and we do not know what happened to the certificate after the mandate went down to the district court.

The finding of the district court that Rose Polski was not equally guilty with Brown and the order granting her relief, notwithstanding she was *in pari delicto*, finds support in the continuation of jurisdiction by equity until the matter is entirely disposed of. *Weaverling v. McLennan*, 116 Neb. 466. In that case we held:

"The equitable principle expressed in the maxim, 'He

who comes into equity must come with clean hands,' being founded on public policy, public policy may require its relaxation or limitation. Even when the parties have been found to be *in pari delicto*, relief has at times been awarded on the ground that in the particular case public policy has been deemed to be best conserved by that course.

"Where equity has assumed to act, it must do complete justice, regardless of whether litigants originally came into court with unclean hands."

The case just cited did not reverse or abate the general legal principle stated in *Johnson v. Owen, supra.*

In the case at bar, which is here for trial *de novo*, the district court failed to find that duress was exercised in obtaining the transfer of the certificate from Mrs. Polski and grounded the judgment upon a finding that she was consciously ignorant of the legal effect of her act and that the assistant to the receiver overpersuaded her and induced her to enter into the illegal agreement; that, therefore, though *in pari delicto* (in a like offense), she was not of equal guilt with him and could recover. However, we think the evidence justifies a finding that her consent to indorse the certificate was the result of duress. She might well be called, without using the term in any offensive sense, an ignorant woman. Her intellectual disparity with Brown was very evident. Her state of health, her pride in the family name, her public shame and mortification that would result if her husband's brothers were prosecuted, the circumstances in which Brown and George L. Polski dealt with her for several hours to consummate the results, even though Lorenz was there to aid her, indicate that her will was overborne and she loaned George nearly $10,000 without security where previously she had resisted alone his importunities to borrow $4,000. As the triers of the facts, we conclude that, in all the circumstances, the action of Brown, the agent and representative of a branch of a coordinate department of the state, under the modern doctrine amounted to duress in procuring her

consent to an illegal agreement. 9 R. C. L. 715, sec. 7.

It follows that the judgment of the district court was right in canceling her indorsement of the certificate and in awarding her the proceeds thereof, for which judgment against plaintiff was directed. The judgment and decree is therefore

AFFIRMED.

POLA LUSTGARTEN, APPELLEE, V. FRANK HARRIS ET AL., APPELLANTS.

FILED MARCH 2, 1932. No. 28146.

1. **Negligence**: COMPARATIVE NEGLIGENCE: QUESTION FOR JURY. In an action by a pedestrian against the owner of an automobile for personal injuries sustained when she was struck by such automobile as she attempted to cross the street in the middle of the block, where it appears that the automobile was more than half a block away when she first started across the street, and that she looked a second time, and no other automobiles were in sight, and where the driver of such automobile saw such pedestrian and, by the exercise of due care in the control thereof, could have stopped in time to avoid striking her, *held*, that the question of the comparative negligence of the parties is one for the jury.
2. **Trial**: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY. "Where different minds may reasonably draw diverse conclusions from the same facts as to whether or not they establish negligence or contributory negligence, those issues must be submitted to the jury." *Perrine v. Union Stock Yards Co.*, 81 Neb. 790.
3. **Evidence** examined, discussed in the opinion, and *held* that the verdict is supported thereby.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Kennedy, Holland & De Lacy, for appellants.

Brome, Thomas & McGuire and *John T. Marcell, contra.*

Heard before GOSS, C. J., ROSE, DEAN, EBERLY, DAY and PAINE, JJ.

DEAN, J.

Mrs. Pola Lustgarten began this action in the district court for Douglas county to recover damages for personal injuries sustained by her when she was struck by an automobile owned by the O'Brien Drug Company and at the time driven by Frank Harris, an employee of the company. Both the drug company and Harris are named as defendants herein. The jury returned a verdict for $5,000 for plaintiff and the defendants have appealed.

The plaintiff, who has driven an automobile for 18 years, parked her car on the south side of Farnam street between Thirty-eighth street and Thirty-eighth avenue. The accident in question here occurred in Omaha, April 4, 1930, at about 11:30 in the forenoon. The plaintiff testified that she left her car, intending to go directly across the street to a grocery store in the middle of the block on the north side of the street. She testified that she saw the defendant's car approaching when more than half a block away, and when she first started across the street, and no other cars were then approaching from the opposite direction. She looked a second time and the car was then only about a half block away. From her evidence it appears that the plaintiff concluded she had ample time in which to cross the street, but when she was only four or five steps from the sidewalk, and while she was crossing the second street car tracks, she was struck by the defendant's car.

Defendant Harris testified that he was going west on Farnam street at the time, and that he slowed down to permit an approaching truck to pass in front of him on Thirty-eighth street, and that he was driving in second gear and at not more than 15 or 16 miles an hour at the time. He also testified that when he first saw the plaintiff she was standing in the middle of the street and he thought she was waiting for him to proceed. From his testimony it appears that he slowed down several times, and that the plaintiff stopped, but that, finally, she started running directly in front of his car just as he stepped

on the accelerator. The plaintiff was struck by the bumper of the car and thrown not more than two feet before the car was stopped. On the cross-examination, it was developed that at no time was the car brought to a complete stop before the accident. The defendant testified that he was still 40 feet from the plaintiff when he sounded the horn the second time and, at that time, he was driving at the rate of only 8 miles an hour. And he testified that he was only 12 feet from the plaintiff when she stopped the second time.

One witness testified that a skid mark, 68 or 70 feet in length, was perceptible on the pavement after the accident, and that the mark was evidently made by the left rear wheel of the car. And another testified that he observed the plaintiff as she left her car and started across the street, but he did not see the car strike her as his vision was obstructed at the time by the wall of the store in which he was employed. He testified that his attention was called to the car as it moved swiftly by and that shortly thereafter he heard the squeaking of the car brakes. He also testified that a long skid mark was made on the pavement and that the car appeared to him to have been driven at about 35 miles an hour when he first noticed it and that at no time did he hear a horn sounded. Another witness testified that his attention was attracted to the defendant's car from the fact that it was being driven a "little bit faster" than the average car. To substantially the same effect is the evidence of another witness who heard the squeak of the tires on the pavement as the brakes were applied, but he heard no horn sounded. On this feature, however, evidence was introduced in behalf of the defendants tending to prove that the horn was sounded immediately before the accident, and that the car was being slowly driven at the time, but that the plaintiff apparently became confused.

In respect of the plaintiff's injuries, the physician who attended her immediately after the accident testified that she sustained a fractured rib, and that she was bleeding

from a wound in the back of her chest which was occasioned by a puncture of a lung, and that she was very weak and complained of pain in breathing. The plaintiff was confined in a hospital for two weeks and thereafter she was removed to her home where she remained in bed for some time. The physician testified that her lung expansion will be permanently limited and her breathing restricted, especially in case of undue excitement or exertion on her part. The fact appears to have been established that, owing to her injuries, the plaintiff has been in an unusual nervous condition and that she has lost considerable in weight. Another physician testified that the plaintiff had the symptoms of traumatic neurasthenia, or nervousness, induced by the accident. And on the part of the defendants the evidence of a physician was introduced. He examined the plaintiff at the request of the defendants and, in his opinion, the plaintiff's rib had healed, and she did not show signs of the lung injury, nor did he discover signs of nervousness in her.

We have examined several of the cases cited by the defendants in support of their theory of the accident, but we do not think the cases so cited are fairly applicable to the facts before us. In the cited cases the plaintiffs crossed the street in the middle of the block, but they did not look for approaching cars after leaving the sidewalk. In the present case, however, the evidence discloses that the plaintiff looked the second time when the defendant's car was then about a half block away. And, according to his evidence, the defendant observed the plaintiff when he was about 100 feet distant from her. So that the question of the negligence of the plaintiff, if any, as compared to that of the defendant was one for the jury. It has been held: "In an action for death of pedestrian struck by defendant's automobile while he was crossing street in middle of block, the evidence is held sufficient to present questions for jury as to whether defendant exercised ordinary care with respect to lookout and speed and control of his car." *Ford v. Werth*, 197 Wis. 211.

And it has also been held: "Testimony in action for personal injuries resulting to pedestrian when defendant's automobile struck her, *held* sufficient to present an issue of fact for jury on question of plaintiff's negligence by attempting to cross street after observing defendant's automobile approaching." *Halamka v. Schneider*, 222 N. W. 821 (197 Wis. 538).

It is to be noted that the evidence herein conflicts in respect of some of the material facts. But the jury evidently believed that the plaintiff was justified in concluding that she had ample time in which to cross the street when no other automobiles were in sight and the defendant's car was then more than a half block away. And it doubtless appeared to the jury that, if the defendant had exercised due and reasonable care in the control of his car, it could then have been stopped in time to avoid striking the plaintiff. We have held: "Where different minds may reasonably draw diverse conclusions from the same facts as to whether or not they establish negligence or contributory negligence, those issues must be submitted to the jury." *Perrine v. Union Stock Yards Co.*, 81 Neb. 790. See *Leon v. Chicago, B. & Q. R. Co.*, 102 Neb. 537; *Casey v. Ford Motor Co.*, 108 Neb. 352; *Luther v. Farmers Union Cooperative Ass'n*, 119 Neb. 676.

Error is assigned in the giving of certain instructions and in the court's refusal to give certain other instructions requested by the defendants. Upon an examination of the instructions given and those refused, however, we conclude that reversible error does not appear in the ruling of the court thereon. The instructions given by the court substantially and fairly cover the issues that are involved herein.

Complaint is also made that the verdict is excessive, but, in view of the evidence before us, we do not agree with counsel on this feature of the record.

We conclude that the judgment must be and it hereby is

AFFIRMED.

CLARENCE G. BLISS, RECEIVER, APPELLANT, V. LIVE STOCK NATIONAL BANK OF OMAHA, APPELLEE.

FILED MARCH 2, 1932. NO. 28104.

1. **Banks and Banking:** MISAPPROPRIATION OF FUNDS BY OFFICERS. Where the president and vice-president of a bank make an unauthorized payment of their individual debts out of funds of the bank, the bank may recover from the creditor who received the payment with knowledge that it was so paid.
2. ———: ———: NOTICE. The fact that the president and vice-president are personally interested in a transaction is sufficient to put the creditor on inquiry as to their authority to pay their individual debts with funds of the bank.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Reversed.*

George I. Craven, for appellant.

W. C. Dorsey and *Howard M. Baldrige, contra.*

Heard before ROSE, DEAN, GOOD and DAY, JJ., and THOMSEN, District Judge.

DAY, J.

This action was brought by the receiver of the First State Bank of Bethany against its president and vice-president and the Live Stock National Bank of Omaha, Nebraska, for the conversion of funds of the bank. The trial court entered judgment against the officers of the bank and in favor of the Live Stock National Bank against the receiver. The receiver appeals from the latter part of the judgment.

The transaction involved in this controversy had its inception in June, 1929, at which time the First State Bank of Bethany, on account of an apparent loss occasioned in part by their moving from the suburbs into the heart of the city, had an impairment of their capital amounting approximately to $4,000, which impairment of capital the banking department of the department of trade and commerce of Nebraska insisted should be replaced by the stockholders. To this end the vice-president of the bank

negotiated with the Live Stock National Bank of Omaha, Nebraska, for a loan of $4,000 on a note to be signed by one stockholder of the state bank and payment to be guaranteed by the other stockholders. This negotiation was carried on by correspondence, and the application of the vice-president to the Live Stock National Bank contains the following statement: "This is for the bank to cover deficit which was made when we started here and bought considerable supplies, but we are going good now and should soon be on a paying basis. We will also send in property statements. You will remember I told you about this when I was there, in your bank, and we do not want our public statement go out showing a deficit." This loan was finally made upon a note signed by the president and vice-president of the bank in their individual capacities and payment guaranteed by the other directors. The proceeds of the note were by the Live Stock National Bank placed on deposit to its credit in said First State Bank of Bethany. This amount was placed either in the undivided profits or surplus of the First State Bank. This replaced the impairment of the capital of the bank to the satisfaction of the state banking department, and accrued to the benefit of the stockholders of the bank and was for their benefit rather than for the benefit of the bank. This note was for 90 days and was dated June 26, 1929, and thereafter on September 27, 1929, the First State Bank sent to the Live Stock National Bank a draft for $500 as partial payment upon the note. This draft was not drawn upon the appellee but upon the Continental State Bank of Lincoln. The individuals liable on this note who were officers of the bank paid nothing to the bank for this draft. It was credited upon the note and renewal note and the balance of $3,500 due October 10 was accepted by the Live Stock National Bank. Subsequently, on October 17, 1929, this renewal note, at the direction of the vice-president of the First State Bank, who, in his individual capacity, had signed the note as maker, was charged to the account of the bank and thereupon the Live Stock

National Bank returned the note and the guaranty to the First State Bank.

The learned trial judge in the decision of this case relied upon the case of *State v. American State Bank*, 114 Neb. 722. In the syllabus in that case this court said: "Where an officer of a bank gives his individual note to another bank and places the proceeds to the credit of the bank of which he is an officer, and which it accepts and uses, such bank may not complain that such officer subsequently pays and discharges his note out of the bank funds. The transaction is equivalent to the bank borrowing the money and subsequently paying its own debts." The trial court was of the opinion that the above quoted law applied to the facts of this case. In the decree the trial court stated: "The argument that the impaired capital of the Lincoln bank cast a legal obligation on each stockholder is such an issue as to make the note in question in this case an individual obligation, while persuasive, does not appeal to this court as conclusive. All the stockholders or practically all of them authorized, if not directed, the Heiligers to negotiate this loan, and they all guaranteed its payment. All of which was done primarily for the use and benefit of the bank as such." While according the finding of the trial judge great respect and consideration, we are unable to reach the conclusion that the evidence in this case is sufficient to support such a finding. This loan was secured by the directors upon the individual note of two of the officers and guaranteed by others for the purpose of restoring an impairment to the capital stock. Such a loan was for the benefit of the stockholders and not for the benefit of the bank. The Live Stock National Bank, when they made this loan, made it, not as a loan to the bank, but upon the individual obligation of the stockholders. They were cognizant of its purpose, for in the very first letter, portions of which are heretofore quoted, they were told that it was for the express purpose of covering a deficit in the bank, and that they as stockholders were putting this

money in the bank in order that their public statement might not be issued showing a deficit. A perusal of the correspondence passing between the makers of the note and the bank is not capable of any construction except that such loan by the Live Stock National Bank was the individual and personal obligation of the stockholders of this bank. In passing, it is noted that a loan of this character to the bank was not of benefit to it. If the bank borrowed this money on its faith and credit, it was in no better shape after the loan than it was before. Regarded as a loan for the benefit of the bank, it merely enabled the bank to fool the department of trade and commerce by misrepresentation into permitting the bank to continue to accumulate and increase its losses so that at the time of closing it was in a worse condition than at the time of the loan. That a loan does not increase net worth is too simple to require demonstration.

The first payment upon the indebtedness evidenced by the original note of $500 was paid by a draft of the First State Bank for which the makers did not pay. There is no presumption that such a draft was paid for when issued and the burden is on the party claiming it was thus paid to prove it. *Mendel v. Boyd*, 71 Neb. 657. None of the directors or stockholders who had individually guaranteed this note knew at the time the bank closed that the note had been paid except the makers. Where the president and vice-president of a bank make an unauthorized payment of their individual debts out of funds of the bank, the bank may recover from the creditor who received the payment with knowledge that it was so paid. The fact that the president and vice-president are personally interested in a transaction is sufficient to put the creditor on inquiry as to their authority to pay their individual debts with funds of the bank. *State v. Thedford Bank*, 114 Neb. 534. Again, we stated this rule in *State v. Farmers State Bank*, 111 Neb. 585, as follows: "The cashier of a bank cannot legally pay his individual note with other notes belonging to the bank, and the payee in

such an individual note may be held liable for conversion if, with knowledge of the facts, he accepts payment in that manner."

The Live Stock National Bank, having received payment of the individual note of the president and vice-president of the First State Bank, unauthorized, from funds of the bank with knowledge, is liable for conversion of the amount so paid. The judgment of the district court is reversed and the cause is remanded for further proceedings in accord with this opinion.

REVERSED.

WOODS BROTHERS CORPORATION, APPELLANT, V. MARTHA FRANCKE, APPELLEE.

FILED MARCH 2, 1932. No. 28170.

1. **Banks and Banking**: CHECKS: DUTY OF ACCEPTOR. One who accepts the check of a third party as a conditional payment of a debt is charged with the duty of collecting it without negligence.
2. ———: ———: ———: NEGLIGENCE. In such a case, the circuitous routing of the check through a distant bank situated outside the state, requiring six days for making a presentment for payment, which might have been made in one day, is negligence.
3. ———: ———: ———. Such negligence, if it causes the check to be unpaid, will render the conditional payment of the debt absolute.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Woods, Woods & Aitken and *I. E. O. Pace*, for appellant.

Mockett & Finkelstein, contra.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY, DAY and PAINE, JJ.

DAY, J.

This action was brought to recover the amount due for the purchase price of a mortgage bond. The price of the bond was $1,018.68, of which $18.68 was paid, and plaintiff now sues for $1,000. At the time of the sale, October 2, 1929, the defendant tendered in payment of the $1,000 a check dated September 24, 1929, of a third person, payable to defendant and indorsed by her in the said amount, drawn on the Bank of Eagle, Nebraska. The plaintiff deposited this check in its account in the Central Trust Company of Chicago, Illinois, and it was forwarded to the Federal Reserve Bank at Omaha, Nebraska, and by it sent to the Bank of Eagle, Nebraska, for payment, October 8, 1929. The check remained in the Bank of Eagle without remittance on the 8th, 9th, and 10th of October, and on October 11 the Bank of Eagle closed. During the period the check was in the Bank of Eagle, the only bank in Eagle, the bank was open for business, accepting deposits and paying checks, and had cash in its vaults and credits in correspondent banks sufficient to pay the check. The maker of the check had sufficient funds in his account in the Bank of Eagle to pay the check. From a judgment in favor of the defendant in the district court, the plaintiff appeals.

There is no substantial dispute in the facts relative to this transaction, but there is a dispute between the parties as to the legal effect to be deduced from these facts. The defendant contends that Woods Brothers Corporation took the check in payment for the real estate bond delivered to her, while the plaintiff insists that it took the check for collection only. On October 2, the date the check was indorsed in blank and delivered to Woods Brothers Corporation, the plaintiff delivered to the defendant a real estate bond of $1,000. Thereupon the defendant became the owner of said bond and Woods Brothers Corporation became the owner of said check. *Henefin v. Live Stock Nat. Bank,* 116 Neb. 331. The defendant was in no position to maintain an action on the check

and was unable to present it for payment and was not the owner thereof. True, on October 2 the defendant was liable as indorser, but this suit is not brought against the defendant as such indorser. As such indorser she would not have been liable because of the delay caused by the circuitous routing by the deposit of the check in the Chicago bank as before outlined, as such delay was sufficient to discharge the indorser. *First Nat. Bank of Wymore v. Miller,* 37 Neb. 500; *Bedell v. Harbine Bank,* 62 Neb. 339.

On the other hand, the plaintiff contends that the check was not accepted from the defendant in payment but merely as conditional payment, and in view of the non-payment of the check, the defendant owes the original debt. To support this contention the plaintiff cites numerous cases, among which is *Chicago, B. & Q. R. Co. v. Burns,* 61 Neb. 793. In that case the check in question was an order of the paymaster to the treasurer of the railroad company to pay an employee. The check was stolen and it was paid upon a forged indorsement. It was held that the giving of this check was not the payment of the debt. Clearly, the rules announced in that case are not applicable here. However, conceding that the check was given to Woods Brothers Corporation as a conditional payment, it was charged with the duty of collecting it. A bill of exchange has been held to be payment if the holder through his own negligence fails to take proper steps to obtain payment. *Phoenix Ins. Co. v. Allen,* 11 Mich. 501; *Smith v. Miller,* 43 N. Y. 171. This court said in *Bedell v. Harbine Bank,* 62 Neb. 339: "If the payee of a check drawn upon a bank in this state indorses it to a bank in a neighboring town for collection and the latter, without the knowledge or consent of the payee, sends it for collection through a distant bank situate outside the state, thereby consuming three days for making a presentment for payment which might have been made in one day, the indorsee will be liable for the consequences of such delay and for any default or negli-

gence of the bank chosen to make the collection." The deposit of this check in the Chicago bank was a proper and convenient method so far as plaintiff was concerned, but it was not a discharge of its duty to the defendant. The delay in presentment caused by the circuitous routing of the check for collection was the cause of the nonpayment of the check. On October 2, 1929, this check was transferred by indorsement of the defendant to the plaintiff. The plaintiff sent the check for deposit in its account in a Chicago bank, which in turn sent it to the federal reserve bank at Omaha, who sent it direct to the only bank in Eagle, the Bank of Eagle, to which the check was directed. The check reached the Bank of Eagle on October 8. Notwithstanding the fact that the bank was open for business and did receive deposits and pay checks on the 8th, 9th, and 10th of October, the check remained in the bank and no remittance was made thereon. The Bank of Eagle, Nebraska, is shown by the record to be 18 miles from Lincoln, connected by telephone lines and two trains each way each day. If the check had been deposited in a Lincoln bank, it would have reached Eagle on October 3 or 4 and the check would have been paid or nonpayment would have been known to the parties several days before the bank closed. As it was, the defendant did not receive notice until the check had been returned by the agent of the banking department in charge of the closed bank who returned it by the circuitous route by which it had come, that is, by way of Chicago; thereupon it was returned to Woods Brothers Corporation, who notified her on October 17, or 15 days after they had received the check. Regardless of the view taken of this case, as to the situation created by the facts, plaintiff is precluded from recovering in this case on account of their negligence in the collection of the check.

AFFIRMED.

LOUISE LEMERE, APPELLEE, V. ALTON D. WHITE ET AL., APPELLANTS.

FILED MARCH 2, 1932. No. 28176.

Mortgages: FORECLOSURE: SALE: CONFIRMATION. Mere inadequacy of price in a sale under foreclosure will not justify a court in refusing a confirmation, unless such inadequacy is so great as to shock the conscience of the court or to amount to evidence of fraud.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Morsman & Maxwell and *William Baird & Sons*, for appellants.

Rose, Wells, Martin & Lane, contra.

Heard before GOSS, C. J., DEAN, EBERLY, DAY and PAINE, JJ.

PAINE, J.

The plaintiff owned a mortgage of $5,800 upon a rooming-house in Omaha. The plaintiff bid in the property at foreclosure sale for $6,800, and waived a small deficiency judgment which might have been taken. Objections to confirmation were overruled and the sale confirmed. The defendants, Alton D. White and the United States National Bank, Trustee, have appealed on the ground of inadequacy of price.

The record discloses that H. Cooper gave the original mortgage to Arthur J. Miller, who assigned the mortgage to the plaintiff. Upon April 19, 1919, Alton D. White, who had purchased the place, executed the extension agreement, extending the maturity date to July 10, 1924, but he continued to pay interest thereon after maturity and up to January 10, 1929. A decree of foreclosure was entered July 30, 1930, and a stay of nine months taken. On May 5, 1931, the order of sale was issued, and the property sold by the sheriff June 16, 1931. Defendant White had the hearing on confirmation set over until

August 15, 1931. Upon June 25, 1931, the United States National Bank, trustee under a trustee's deed issued to it by defendant White, filed objections to confirmation on the ground of inadequacy of price realized, and alleging that a greater price would be realized upon a resale, and in support thereof filed five affidavits of five men engaged in the real estate business in Omaha, Nebraska, each affidavit being in exactly the same form, setting forth that the affiant had been actively engaged in the real estate business in Omaha for a certain number of years, was well acquainted with the property, and that in his opinion the fair market value of said property was $26,000. Objections to the confirmation were also filed by Alton D. White, defendant, on the same ground; and a counter affidavit was filed by Charles D. Armstrong, another real estate agent of Omaha, in which he set out that the fair and reasonable market value of the property did not exceed $15,000, and that rooms in the building had been rented to tenants furnished, but that Alton D. White was also the owner of the furniture, and that all of the furniture had been attached, and that when the furniture was taken out of the building the building would become vacant and be of much less value than the above amount. An affidavit was also filed by G. F. Kroeger, of the Omaha National Bank trust department, setting forth that the delinquent taxes against said property amount to over $5,000, and that in his opinion "a purchaser for said property cannot be found at this time or in the near future for an amount in excess of the sum due on the decree plus the unpaid taxes which are liens on said property."

The same question has been before courts in other states, and they have held against the contention of the appellants.

Mere inadequacy of price will not justify a court in refusing to approve a sale, unless the inadequacy is so great as to shock the conscience of the court or to amount to evidence of fraud, and such inadequacy is not shown

by sale for $150 of land claimed to be worth $300. *Doyle v. Maxwell,* 155 Ark. 477.

The only question to be decided on objections to confirmation of sale of land under mortgage foreclosure is whether the price was the best that the property would then bring for cash. *Dunlop v. Chenoweth,* 90 N. J. Eq. 85.

"A foreclosure sale will not be set aside on the ground of inadequacy of the price bid, in the absence of a showing that a larger or even as large a price could be obtained on a resale." *Farmers Bank v. Quick,* 39 N. W. 752 (71 Mich. 534).

"It is the general rule that, in the absence of fraud and unfairness, mere inadequacy of price does not furnish sufficient ground to invalidate a foreclosure sale, unless the price is so grossly inadequate and unconscionable as to shock the moral sense, or unless there be additional circumstances against its fairness." 19 R. C. L. 584, sec. 397. See *Wells v. Lenox,* 108 Ark. 366, Ann. Cas. 1914D, 11.

This court having the entire record before it in the form of affidavits, we are in no manner bound by the finding of the trial court.

This court has held: "A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake." *First Nat. Bank v. Hunt,* 101 Neb. 743; *Lindberg v. Tolle,* 121 Neb. 25.

This property sold for substantially its full value, considering that the delinquent and unpaid taxes against it amount to over $5,000, and no affidavit is submitted of any bidder willing to raise the price bid in the event of resale. *Fink v. Murdock,* 98 Neb. 1.

"There are no restrictions upon the means by which the trial court may satisfy itself that a fair price was obtained at a foreclosure sale or that a subsequent sale would not realize a greater amount. The burden is upon

the appellants to show affirmatively that the judgment of the trial court is erroneous." *Occidental Building & Loan Ass'n v. Beal, ante,* p. 40.

We have examined the record and believe the land sold for its fair and reasonable value under the conditions existing at the time. The judgment of the district court is therefore affirmed, with leave to redeem before mandate is issued.

AFFIRMED.

HOPE MCKINNEY, APPELLEE, V. IVAN WINTERSTEEN, APPELLANT.

FILED MARCH 2, 1932. No. 28081.

1. **Automobiles: SPEED: OPINION OF EXPERT.** A qualified expert, upon laying a proper foundation, may give his opinion as to the speed of an automobile, based on the length of skid marks made by it when brakes were applied.
2. **Infants: NEGLIGENCE.** A child six years of age is not possessed of sufficient discretion to make her guilty of negligence, or contributory negligence, for her failure to exercise due care for her safety.
3. **Evidence** examined, and *held* to support the verdict of the jury.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Frederick J. Patz and *George Boland,* for appellant.

Donald Gallagher, contra.

Heard before GOSS, C. J., EBERLY and PAINE, JJ., and BEGLEY and ELDRED, District Judges.

BEGLEY, District Judge.

Action brought by Hope McKinney, a minor, by her father and next friend, against Ivan Wintersteen, for damages alleged to have been sustained because of the negligent operation of an automobile owned by the defendant, appellant, and driven by his agent, Allen Wintersteen. At the close of the evidence the defendant moved for a directed verdict, which was overruled, and the jury

returned a verdict for the plaintiff for the sum of $2,000. From a judgment entered thereon, the defendant has appealed.

The negligence charged against defendant's agent and alleged to be the proximate cause of the injuries are: (1) In exceeding the speed limit of ten miles an hour at the time he struck plaintiff, and that his car was going at the unreasonable and improper speed of about thirty miles an hour; (2) defendant's agent failed to keep his car under proper control; (3) defendant's agent failed to keep a proper lookout for pedestrians in said alley; (4) defendant's agent failed to sound any horn or give any signal of his approach; (5) defendant's agent failed to stop or turn his automobile so as to avoid striking plaintiff.

The defendant's answer alleged in substance that defendant's automobile was being driven westerly in said alley in a careful, prudent and lawful manner, approximately eight to ten miles an hour, and that plaintiff ran into the alley from the south and ran into the defendant's car, which had been swerved to the north and stopped, and that there were buildings and other obstructions bordering the alley which prevented the defendant from seeing the plaintiff.

The evidence shows that on September 19, 1930, at about noon, the plaintiff, a minor child of six years, was crossing from south to north a paved public alley that runs east and west between Twenty-first and Twenty-third streets in the city of Lincoln, Nebraska, when an automobile, owned by defendant and driven for defendant's benefit by his agent, Allen Wintersteen, over and upon said alley in a westerly direction, ran into and struck the plaintiff and injured her.

It is admitted by the record that the maximum speed limit in any alley in the city of Lincoln is ten miles an hour, as fixed by city ordinance. Allen Wintersteen, the only eyewitness to the accident besides the plaintiff, testified that he had just taken his car from a nearby garage

where he had the brakes adjusted and that same were in a good state of repair; that he drove into the alley and did not sound his horn; that he was traveling about ten miles an hour; that he did not see the plaintiff until she was three feet in the alley; that she was running north and a little east, and when she was about nine feet in front of his car, he slammed on his brakes and the left front headlight of defendant's car struck the plaintiff; that he had driven through the alley on other occasions; that the day was clear and the street was dry; that after the accident he saw skid marks behind the car between six and eight feet in length. Two witnesses for the plaintiff testified that the skid marks were eighteen feet in length on the pavement and two police officers testified said marks were twelve feet in length. An expert witness testified that he had made experiments in the alley with a car of similar weight and good brakes, and that the car driven at the rate of speed of ten miles an hour would not make skid marks in that alley over two feet in length when the brakes were applied; that when the car was driven at twenty miles an hour the skid marks were not over six feet, and when driven at thirty miles an hour the skid marks were not over ten feet; and that in his opinion, at the time of the accident, defendant's car was being driven over thirty miles an hour.

The evidence of skid marks on the roadway made by an automobile makes the question of speed and control of said automobile one for the jury, and a qualified expert may give his opinion as to the speed of the automobile, based on the length of the skid marks made by it. *Carson v. Turrish*, 140 Minn. 445; *Heidner v. Germschied*, 41 S. Dak. 430; *Luethe v. Schmidt-Gaertner Co.*, 170 Wis. 590.

Appellant contends that this case should be ruled by the decision in the case of *De Griselles v. Gans*, 116 Neb. 835. The facts in the two cases are very readily distinguished. In that case, the court found that defendant was not guilty of negligence; that he was driving twelve

or fifteen miles an hour and his car was stopped in from three to five feet; that he was not driving in violation of any ordinance, and that the plaintiff's acts were the proximate cause of the accident. In this case, the plaintiff's evidence is to the effect that defendant was driving in excess of thirty miles an hour, when the ordinance provided for ten miles; that he saw the plaintiff when nine feet from the car and could have stopped his car within two feet if driving at the rate of ten miles an hour. We think the question of defendant's negligence as to the rate of speed he was driving was for the jury.

Appellant complains that the court erred in the instruction submitting the question of contributory negligence and comparative negligence to the jury. On account of her tender years, plaintiff cannot be deemed in law, to be possessed of sufficient discretion to make her guilty of negligence for her failure to exercise due care for her safety. *Sacca v. Omaha & C. B. Street R. Co.*, 98 Neb. 73. The instruction was therefore not prejudicial to appellant. However, while the plaintiff is not chargeable with negligence, if her act, whether negligent or not, was the proximate cause of her injury, there can be no recovery. *De Griselles v. Gans, supra.*

From a careful reading of the evidence we conclude that the jury were justified in finding that the proximate cause of the injuries was the negligence of defendant's agent in driving his automobile through said alley at an unlawful rate of speed and without having the same under proper control.

Appellant complains that the verdict is excessive. The evidence shows that appellee received a fractured skull; her left collar bone was fractured; her forehead cut above the right eye; her finger was cut, and she sustained a pressure on the brain; that before the accident she was a bright girl, and that since the accident she has been dull and complains of headaches, which may continue; her eyesight may be decreased and there may be dizzi-

ness. This evidence is sufficient to sustain a verdict as to the amount.

The judgment is

AFFIRMED.

CHRIS STABEN, JR., APPELLEE, V. MAURICE MEHRENS, SHERIFF, ET AL., APPELLANTS.

FILED MARCH 2, 1932. No. 28093.

1. Judgment: VALIDITY: INJUNCTION. A judgment debtor who files a dilatory pleading in a suit filed against him in county court and thereafter consents with the plaintiff to permit the cause to be continued for more than three terms of court in order that he may procure evidence of a partial payment, claimed to be made by him, and thereafter abandons his defense and permits the plaintiff to take default judgment against him, cannot in a collateral proceeding, by injunction, enjoin the enforcement of such judgment as void under section 27-524, Comp. St. 1929, as having been continued for more than three terms of court without his consent.
2. ———: RELIEF IN EQUITY. "In a suit by a judgment debtor to enjoin the enforcement of a judgment, on the ground that it is void because the court wherein it was rendered had not acquired jurisdiction over his person, a court of equity will not grant affirmative relief unless it is made to appear that he had a meritorious defense to the cause of action on which the judgment was based." *Braun v. Quinn*, 112 Neb. 485.

APPEAL from the district court for Washington county: CHARLES E. FOSTER, JUDGE. *Reversed and dismissed.*

W. A. Ehlers, for appellants.

Howell, Tunison & Joyner, contra.

Heard before GOSS, C. J., EBERLY and PAINE, JJ., and BEGLEY and ELDRED, District Judges.

BEGLEY, District Judge.

This is an action in equity wherein the plaintiff, Chris Staben, Jr., filed a petition against the defendants, seeking to enjoin and restrain the enforcement and collection of a judgment entered on the 20th day of March, 1930,

in the county court of Washington county, Nebraska, for the sum of $427 and costs. The transcript of such judgment had been filed in the office of the clerk of the district court for Washington county, on which an execution had been issued and a levy made on certain lands belonging to the plaintiff herein and about to be sold thereunder.

The plaintiff alleged in his petition that the judgment was and is a nullity and void, in that said county court of Washington county, Nebraska, was without jurisdiction to enter any judgment, and had lost jurisdiction of said cause at the time said judgment was attempted to be rendered, and prayed that the judgment be decreed a nullity and void and the defendants enjoined from proceeding to execute such judgment. The district court found for the plaintiff and enjoined the enforcement of the judgment. A motion for a new trial was overruled, and defendants have appealed.

There is little dispute as to the evidence. On June 14, 1929, Robert Ross, as plaintiff, filed a petition in the county court of Washington county, praying judgment against Chris Staben, Jr., defendant, in the sum of $409.70. The summons was served upon Chris Staben, Jr., personally, and on July 30, 1929, defendant Staben, by his attorneys, O'Hanlon and O'Hanlon, of Blair, Nebraska, filed a motion to require the plaintiff to make the petition more definite and certain. No further action of any kind was taken or entered by the court until on the 20th day of March, 1930, when the county judge procured a confirmation from O'Hanlon and O'Hanlon over the telephone that they had withdrawn from the case, and thereupon, at the request of the plaintiff's attorney, overruled the motion of the defendant as being a dilatory motion and entered a default judgment against the defendant in the sum of $427.60, together with costs taxed at $9.65.

Two questions are presented for determination: (1) Did the county court lose jurisdiction of the case by permitting same to be continued for more than three terms be-

fore entering judgment therein? (2) Is the appellee herein entitled to an injunction to prevent the enforcement of the county court judgment, without first alleging and proving a meritorious defense to said cause of action?

Section 27-524, Comp. St. 1929, reads as follows: "The provisions of the Code of Civil Procedure relative to adjournment of causes before justices of the peace, shall apply to civil actions in the county court not cognizable before such justices, so far only as the causes for adjournment and the conditions to be imposed thereon are concerned, but the time for which the cause may be adjourned shall be regulated by the county judge in the exercise of a reasonable discretion: Provided, such action cannot be adjourned over more than three regular terms of said court, upon the application of either party, without the consent of the other."

Judge I. C. Eller, the county judge who entered the judgment in the case, testified that he held regular terms of his said court; that no order was entered continuing this case to the next regular term after July, 1929; that it was his understanding of the law and of the attorneys in the case that the filing of the motion by the defendant made a general appearance and waived any irregularities and held the case in abeyance until it was heard.

Mr. W. A. Ehlers, attorney for the defendants herein testified that he was the attorney of record for the plaintiff in the case; that the hearing on the motion of the defendant was continued from time to time by agreement of the attorneys until in February of 1930, when the then attorneys for the defendant dictated a letter in his presence, notifying the defendant that they were withdrawing as counsel and directed him to procure other counsel; that three or four days after that, Mr. Joyner, of the firm of Howell, Tunison & Joyner, called him and stated that they had been employed by defendant and, after various conversations about a compromise settlement, whereby the defendant claimed to have made a payment on the note in the sum of $100, asked and were given time to pro-

cure the receipt, and that the matter drifted along until the 19th of March, 1930, when Mr. Joyner stated that they would not defend further, and that the plaintiff was entitled to take judgment if he so wished, and he thereupon arranged for the county judge to have judgment entered in accordance therewith and to have the motion of O'Hanlon and O'Hanlon overruled; that, before entering the default judgment, the county judge called the firm of O'Hanlon and O'Hanlon and they notified him that they had withdrawn from the suit.

Mr. Joyner, one of the attorneys for the defendant, testified that he came to Blair and examined the record in the case, and that he afterward had a talk with Mr. Ehlers, wherein he told him that more than three terms of court had passed; and that the court had lost jurisdiction of the case; that any judgment he took would not be worth anything because the court no longer had jurisdiction of it.

It will be noted that by said section of the statute the time for which a cause may be adjourned shall be regulated by the county judge, in the exercise of a reasonable discretion, but it cannot be adjourned over more than three regular terms upon the application of either party without the consent of the other. Neither party to the suit made application for a continuance nor was any objection filed to same. On the contrary, the evidence shows that the parties did agree to the various continuances, and that same were had for the benefit of appellee herein, in order that he might search for a receipt which he claimed to have in his possession. Appellee knew of the contemplated judgment and failed to file objections with the court that the continuances were had without his consent. The lack of consent does not appear affirmatively upon the judgment. His present plight is attributable to his own neglect. *Shufeldt v. Gandy*, 34 Neb. 32. The fact that the county judge or his clerk neglected or omitted to make a record of such continuances, where the plaintiff is without fault, cannot, as between the parties,

deprive the plaintiff of his rights therein through such official neglect. *Crete Mills v. Stevens,* 120 Neb. 794.

As to the second proposition, it is admitted that appellee has neither pleaded nor proved that he has a meritorious defense to the county court judgment. The rule of the majority of the courts, including Nebraska, is that in a suit by a judgment debtor to enjoin the enforcement of a judgment, on the ground that it is void because the court wherein it was rendered had not acquired jurisdiction, a court of equity will not grant affirmative relief unless it is made to appear that he had a meritorious defense to the cause of action on which the judgment was based. 39 A. L. R. 414, note.

In the case of *Bankers Life Ins. Co. v. Robbins,* 53 Neb. 44, the court held: "A party against whom a judgment has been rendered by default, which judgment is void for want of jurisdiction over the person of the defendant, is not entitled to an injunction to restrain the enforcement of such judgment unless he makes it appear, both from his pleadings and proof, (1) that he has a meritorious defense to the cause of action on which the judgment is based; (2) that he has no adequate remedy at law; and (3) that his plight is in nowise attributable to his own neglect."

The case of *Braun v. Quinn,* 112 Neb. 485, appears to be directly in point. The court said: "The reason usually given for the rule against relieving from a void judgment unless a meritorious defense to the cause of action is averred is that equity will not do a useless thing, and it would subserve no useful purpose to set aside a judgment for want of jurisdiction, if the party seeking the injunction had no defense to the cause of action upon which it was based. Another reason is that it is not enough that the judgment assailed be unlawful. It must be against conscience as well."

The trial court therefore erred in granting an injunction against the enforcement of the county court judg-

ment. The judgment is reversed and the cause is dismissed.

REVERSED AND DISMISSED.

JUANITA HAMAKER, APPELLANT, V. ABRAHAM L. PATRICK, APPELLEE.

FILED MARCH 11, 1932. No. 27986.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Herman Aye and *L. J. Te Poel,* for appellant.

William Baird & Sons and *L. C. Hupp, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

PER CURIAM.

This is an action at law. Plaintiff's petition set forth two causes of action. There was a trial to a jury with verdict and judgment for plaintiff.

At the close of the evidence, the bill of exceptions discloses that the defendant moved the court to direct a verdict in favor of the defendant "for each and all of the following reasons," which included the insufficiency of the evidence to sustain a verdict in favor of the plaintiff and against the defendant. However, the cause was duly argued to the jury, a verdict returned for the plaintiff, and a judgment entered thereon. Within the time provided by statute, the defendant filed a motion for a new trial. At the time of hearing on this motion the following order was entered:

"This cause having duly come on for hearing on January 30, 1931, on the motion of the defendant, Abraham L. Patrick, to vacate and set aside the verdict of the jury and the judgment rendered thereon on January 8, 1931, and for a new trial, and the same having been duly submitted and heard and argued by counsel for the parties

and having been taken under advisement, and the court now being fully advised in the premises finds:

"That the motion of the defendant should be sustained, and also finds that the motion of the said defendant for a directed verdict or for a dismissal of the action, duly made by the said defendant at the close of the evidence, in the trial in the above action, should be sustained and the action dismissed.

"Wherefore, it is ordered and adjudged by the court that the motion of the defendant to vacate and set aside the verdict and judgment and for a new trial, heretofore referred to, be and the same is hereby sustained, and the verdict of the jury and the judgment thereon rendered and entered on January 8, 1931, be and are hereby vacated, set aside and annulled.

"It is further ordered and adjudged that the order of the court overruling the motion of the defendant for a directed verdict or a dismissal of the action, made at the time of the closing of the evidence in the trial of this case, be and is hereby vacated and set aside, and said motion be and is hereby sustained, and the above entitled action be and is hereby dismissed," etc.

"Dated February 28, 1931."

It is obvious that the effect of the court's judgment above set forth was to annul and set aside all proceedings subsequent to the motion made by the defendant, at the close of the evidence of all the parties, to dismiss or for an instructed verdict in his behalf. The trial court's judgment of dismissal thereupon entered was the same in force and effect as if originally made and entered "at the close of the evidence." The plaintiff thereupon became the "aggrieved party," vested with the right to file and present a motion for a new trial. Comp. St. 1929, secs. 20-1142, 20-1143. This, the record before us discloses, he failed to do. No motion for a new trial in behalf of the plaintiff appearing in this record, the only question for this court presented thereby is the determination of whether the answer of the defendant supports

the judgment entered. We are not permitted to go back of this judgment of the trial court to review anything done or any proceedings had prior to the judgment. *Johnson v. Songster,* 73 Neb. 724; *Farmers & Merchants Nat. Bank v. Mosher,* 63 Neb. 130; *Hansen v. Kinney,* 46 Neb. 207.

So, too, an objection that the findings and judgment of the court are not supported by sufficient evidence is, in the face of this record, unavailing, it failing to show that a motion for a new trial was filed and ruled on. *Gretna State Bank v. Grabow,* 52 Neb. 354; *Losure v. Thompson,* 45 Neb. 466.

The allegations in the defendant's answer presenting a defense to plaintiff's claim set forth in his petition, we are required to affirm the action of the trial court.

AFFIRMED.

REX BALL V. STATE OF NEBRASKA.

FILED MARCH 11, 1932. NO. 28048.

1. **Criminal Law:** REVIEW. An instruction not challenged as erroneous in the motion for a new trial is not reviewable in a proceeding in error.
2. **Intoxicating Liquors:** BOOTLEGGING: SUFFICIENCY OF EVIDENCE. Evidence that accused was arrested while backing an automobile containing bottles of intoxicating liquor away from a curb in a street and afterward told an officer he had driven the car and left it while delivering therefrom bottles of intoxicating liquor may be sufficient to sustain a conviction for bootlegging.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

L. R. Doyle, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

ROSE, J.

In a prosecution by the state in the district court for Lancaster county Rex Ball, defendant, was convicted of bootlegging, and for that offense was sentenced to serve a term of 60 days in the county jail and to pay a fine of $100. As plaintiff in error defendant presents for review the record of his conviction.

Complaint is made of an instruction to the jury, but it was not challenged as erroneous in the motion for a new trial and is therefore not reviewable in the proceeding in error.

Insufficiency of the evidence to sustain the conviction is urged as a ground of reversal. Defendant argues there is no evidence that he kept or carried around in a vehicle intoxicating liquor with intent to sell or dispose of it in violation of the statute defining "bootlegging." Comp. St. 1929 sec. 53-103.

The evidence shows that defendant backed an automobile containing bottles of intoxicating liquor away from a curb on a street in the city of Lincoln and was arrested before he got away. There is also evidence he afterward told an officer he had driven the car and left it while delivering bottles of liquor therefrom. This is sufficient evidence of intent to sell or dispose of intoxicating liquor actually found and kept in his car.

AFFIRMED.

GEORGE L. MCCARTER, APPELLEE, V. J. D. COVER, APPELLANT.

FILED MARCH 11, 1932. No. 28166.

1. Appeal: TRIAL TO COURT: EVIDENCE: COMPETENCY: PRESUMPTION. In an action at law tried to the court without a jury, the presumption on appeal is that competent evidence only was considered in the determination of the issues.
2. ———: ———: FINDINGS. On appeal in an action at law tried to the court without a jury, the findings below have the same effect as the verdict of a jury.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Nye & Nye, for appellant.

John J. Cameron, Jr., contra.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY, DAY and PAINE, JJ.

ROSE, J.

This is an action to recover the amount due on the claim that plaintiff sold to defendant a town lot in Lexington and was to receive in part payment the stock and fixtures of a bakery in Grand Island, including a truck valued at $275 and rent of $45.75—two items of consideration never received. The prayer was for judgment in the sum of $320.75, with interest from May 18, 1930.

In an answer to the petition defendant put in issue the facts entitling plaintiff to relief and pleaded a counterclaim of $650 for breach of warranty in the deed to the Lexington lot for which the bakery in Grand Island had been accepted in part payment. The alleged breach of warranty consisted of encroachments of buildings extending beyond the boundary of an abutting lot. This claim was contested by plaintiff.

Before the district court without a jury, there were spirited trials which resulted in a judgment for $355.85 in favor of plaintiff for the price of the truck and the unpaid rent, and in a judgment for $445.08 in favor of defendant on his counterclaim for breach of warranty. Defendant appealed from the judgment for $355.85.

The judgment from which the appeal was taken is challenged for assigned errors in rulings on evidence and for insufficiency of the evidence to justify the conclusion reached by the district court. All material evidence offered on either side was admitted during the trial. In an action at law tried to the court without a jury, the presumption on appeal is that competent evidence only was considered in the determination of the issues. The

entire record has been examined with care and it shows an abundance of competent evidence to support the judgment. In such a case the findings have the same effect on appeal as the verdict of a jury. Prejudicial error has not been pointed out.

AFFIRMED.

SYD LENTZ V. STATE OF NEBRASKA.

FILED MARCH 11, 1932. NO. 28212.

Intoxicating Liquors: BOOTLEGGING: INTENT. Under an information for "bootlegging," charging that accused kept, or carried around on his person, or left in a place for another to secure, intoxicating liquor with intent to sell or dispose of it, evidence of such intent, or evidence of circumstances from which it may be inferred, is essential to a conviction. Comp. St. 1929, sec. 53-103.

ERROR to the district court for Gosper county: CHARLES E. ELDRED, JUDGE. *Affirmed in part, and reversed in part.*

Ted R. Frogge and *McNeny, Gilham & Sprague,* for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

ROSE, J.

In a prosecution by the state in the district court for Gosper county, Syd Lentz, defendant, was convicted on the charge that he had possession of intoxicating liquor May 13, 1931, for the purpose of unlawful use and disposition, and was fined $100 therefor; on the charge that he had possession of intoxicating liquor January 21, 1931, for the purpose of unlawful use and disposition, and was fined $100 therefor; on the charge that he was guilty of bootlegging January 21, 1931, and was fined $100 therefor and also sentenced to serve a term of 90 days in the county jail. As plaintiff in error he presents for review the record of his convictions.

Defendant insists that the evidence is insufficient to sustain a conviction on any charge. The record shows that this contention is without merit, except as to the charge of bootlegging. An examination of the evidence results in the conclusion that it is insufficient to prove beyond a reasonable doubt that defendant, January 21, 1931, kept or carried around on his person, or left in a place for another to secure, intoxicating liquor with intent to sell or dispose of it, as charged in the information and as "bootlegging" is defined by statute. Comp. St. 1929, sec. 53-103. The particular in which the evidence is lacking is the failure to prove the intent to sell or dispose of the intoxicating liquor. Evidence of this element of the statutory offense, or evidence of circumstances from which the criminal intent may be inferred, is necessary to a conviction.

The sentence for bootlegging is reversed for want of evidence and the charge therefor dismissed. The sentences for unlawful possession are affirmed.

JUDGMENT ACCORDINGLY.

IN RE ESTATE OF SUSAN F. KIERSTEAD. MADISON COUNTY, APPELLANT, V. METHODIST EPISCOPAL CHURCH OF TILDEN ET AL., APPELLEES.

FILED MARCH 11, 1932. NO. 27971.

1. **Inheritance Tax: COMPUTATION.** When a will contest has been amicably settled between the beneficiaries named in the will and the heirs at law and they have in good faith stipulated for a decree of distribution in accordance with the settlement, and there is no intent thereby to evade or reduce the inheritance tax, the tax should be computed upon the portion received by each beneficiary under the decree.
2. ———: **EVASION: EVIDENCE.** Evidence of the effect on the property of the estate by the litigation growing out of the contest of the will is admissible to show whether the stipulation was entered into in good faith, without collusion of the parties to evade the inheritance tax.

APPEAL from the district court for Madison county: DE WITT C. CHASE, JUDGE. *Affirmed.*

Carl Peterson and *Moyer & Moyer*, for appellant.

Mapes, McDuffee & Mapes, G. M. Spurlock, W. V. Hoagland and *C. W. De Lamatre, contra.*

Heard before ROSE, GOOD and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

CHAPPELL, District Judge.

Susan F. Kierstead died on June 13, 1927, then a resident of Madison county, Nebraska. She left a last will and testament which was filed for probate in the county court of Madison county, Nebraska. At the time of her death she was a widow about seventy years of age, and no issue survived her. In this will a portion of her estate was given to the following institutions: The Methodist Episcopal Hospital of Omaha, the Odd Fellows Home at York, the Mother's Jewels Home, a Methodist orphanage at York, and the Womans Home Missionary Society of the Methodist Episcopal Church.

A sister and twelve nieces and nephews, heirs at law, contested the admission to probate of this will, but it was admitted to probate by the probate court. An appeal was taken by the contestants to the Madison county district court where trial to a jury was had. This trial lasted more than three weeks; the jury were unable to agree and were discharged. The case was again tried in the district court for Madison county, and the second trial lasted more than five weeks; again the jury disagreed and were discharged without rendering a verdict. Thereupon the contestants filed a motion for a change of venue, asking to have the case removed from Madison county and from the ninth judicial district. This motion, supported by numerous affidavits, was sustained and the appealed action was transferred from Madison county to Platte county. After the case had been transferred from Madison county to Platte county the proponents and contest-

ants entered into a stipulation for the purpose of compromising and settling the litigation growing out of the petition for probate and the contest thereof. Pursuant to this stipulation the district court for Platte county entered its decree. Under this stipulation and decree L. P. Pasewalk, the special administrator appointed by the county court of Madison county, paid into the Platte county district court the sum of $25,010 for the heirs at law, contestants. The decree contains the following clauses: "Sixteenth. The contestants, Samuel J. Whitehead and Bertha Huston or their personal representatives, shall each be paid the sum of $250 as one-half of their legacies out of said fund of $25,010. Seventeenth. The contestants as heirs at law and the personal representatives of Bertha E. Huston, deceased, shall share in the balance of the fund paid into this court in the proportion as follows, to wit: (here follows their names and respective proportions)."

One George H. Moyer was appointed by the county court of Madison county to appraise the estate and make his recommendations as to the levying of an inheritance tax. He made his appraisement and assessment and reported the same to the county court. There is no dispute over the valuation established by the appraisement, and there is no dispute over the procedure which he adopted in making the appraisement, but the appraiser, Moyer, held and reported that the $25,010 paid by the special administrator to the heirs at law, contestants, was taxable, not to the heirs at law, who received it, but to the legatees named in the will, who received no part of it. The legatees under the will appealed from the appraiser's assessment to the county court where the assessment, as made by the appraiser, was approved. The legatees then appealed to the district court where a trial was had and the case submitted to the court. The district court reversed the county court and held that the $25,010 paid to the heirs at law, contestants, was not taxable as property received by the legatees; that the legatees are only

liable to taxation upon such property as they actually receive. From this decree of the district court for Madison county, the county of Madison has appealed to this court.

The assignments of error by appellant on appeal are: (1) The district court erred in exempting the sum of $25,010 received by the legatees under the last will and testament of Susan F. Kierstead, and paid out by them to the contestants under the stipulation of settlement of the will contest; (2) the district court erred in admitting evidence of the effect on the property of the estate of the litigation growing out of the contest of the last will and testament of Susan F. Kierstead.

Appellees in their brief present one other issue to this court to which appellant has filed a reply brief. Appellees contend that chapter 132, Laws 1931, amends the inheritance tax statute, section 77-2201, Comp. St. 1929, to read as follows: "Provided further, that all bequests, legacies, devises, or gifts, to or for the use of any corporation, organization, association or foundation organized and operated exclusively for religious, charitable or educational purposes, no part of which is owned or used for financial gain or profit to either the owner or user or inures to the benefit of any private stockholder or individual, or to the trustee or trustees exclusively for such religious, charitable or educational purposes, shall not be subject to any duty or tax, and no such duty or tax shall be assessed or collected after the taking effect of this act irrespective of the time of the death of decedent or the fact of pendency of his or her estate."

Appellees contend that they are all charitable institutions and that as legatees under the will they are not subject to any inheritance tax whatsoever by reason of this statute, as it contains a retroactive provision.

A careful examination of the transcript and bill of exceptions discloses that it contains no evidence or stipulation on the question as to whether these appellees were charitable institutions and might thereby come within the provisions of this statute, and appellees have filed no

cross-appeal in this court. For this reason, as we view the record, we are not required to determine this question.

Appellant contends, citing many well-reasoned authorities, that all the property composing the estate of Susan F. Kierstead passed by will and that the inheritance tax should be assessed against the right of succession of the legatees named in the last will and testament, under section 77-2201, Comp. St. 1929:

"All property, real, personal and mixed which shall pass by will or by the intestate laws of this state from any person who may die seised or possessed of the same while a resident of this state, or, if decedent was not a resident of this state at the time of his death, which property or any part thereof shall be within this state, or any interest therein or income therefrom, which shall be transferred by deed, grant, sale or gift made in contemplation of the death of the grantor, or bargainer or intended to take effect, in possession or enjoyment after such death, to any person or persons or to any body politic or corporate in trust or otherwise, or by reason thereof any person or body corporate shall become beneficially entitled in possession or expectation to any property or income thereof, shall be and is subject to a tax, at the rate hereinafter specified, to be paid to the treasurer of the proper county for the use of the state, and all heirs, legatees and devisees, administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed."

Appellant takes the position that the inheritance tax law, section 77-2201, Comp. St. 1929, providing that all property, real, personal and mixed which shall pass by will or by the intestate laws of this state shall be subject to a certain tax, imposes a tax upon the right of succession, not upon the estate, debts and the expenses of administration being the only charges upon the estate, and the tax accrues when the estate vests upon decedent's death and is not affected by any transfer or agreements

by those who take the estate, so that a sum which legatees paid out of the estate to contestants of the last will and testament of the deceased, in consideration of their agreement not to further contest the will, is taxable to the legatees. Supporting this contention is cited, among other cases, *In re Estate of Sanford*, 90 Neb. 410. The court held in that case:

"The widow of a testator who takes real estate devised to her by his will in lieu of dower is not in a position to require the taxing authorities to exempt so much of such real estate as equals the value of her dower interest from the payment of an inheritance tax. * * * Real estate devised by will passes to the devisee at the death of the testator, and its status under the law taxing inheritances is fixed at that time. An agreement between devisees to satisfy a claim against the estate in favor of one of them by a conveyance of a portion of such real estate to the claimant will not exempt it from liability for an inheritance tax."

A vigorous and logical dissenting opinion was written in this case by Judge Fawcett as to both propositions above quoted. A rehearing was granted and the decision was modified, the opinion appearing in 91 Neb. 752, in which opinion as to the dower interest, the court said: "The dower interest of the widow in the estate of her deceased husband, whether taken under his will or by operation of law, is not subject to an inheritance tax." In the body of the opinion, as to the other question, the court said: "It is next contended that we should further modify our former judgment by holding that the claim of Charles W. Sanford for $35,524.95 against his father's estate should also be deducted from the appraisement before the inheritance tax is computed. We see no reason to change our former opinion on this question. While the demurrer of the county admits the facts which are well pleaded by the petition, it must be observed that the petition is insufficient in that it fails to set forth any enforceable contract or agreement between Charles W. San-

ford and his father which would sustain a judgment against the estate, and it appears that, after the succession of the estate, the beneficiaries under the will, who were also the sole executors thereof, agreed between themselves upon the so-called satisfaction of this claim. Such an agreement should not have the effect of avoiding the payment of a substantial part of the inheritance tax."

Judge Fawcett dissents from so much of the opinion as refers to Charles W. Sanford, for the reasons assigned in his opinion on the former hearing, reported in 90 Neb. 410. The inference or conclusion which this court derives from the modified opinion is that the petition was insufficient in that it fails to set forth any enforceable contract or agreement between Charles W. Sanford and his father which would sustain a judgment against the estate, and that it is not in point or a precedent for this case. It must be observed that the will of the decedent was admitted to probate without contest and that the question of liability for inheritance tax did not arise until two years after the death of the decedent and the probate of the will.

Section 30-221, Comp. St. 1929, now provides: "No will shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the court of probate as provided in this chapter, or on appeal in the district court." Thus, the title to both the real and personal property would have actually passed to and vested in the legatees upon probate of the will more than two years before any controversy whatsoever arose.

The question has never been directly passed upon by this court. A careful study of the authorities discloses that the courts of the different states have adopted three different theories, most of them under statutes similar to ours.

One line of decisions treats the property in compromise of a will contest as expenses of administration for tax purposes, and thereby not taxable at all for any purpose. This proposition the court believes is a subterfuge and

inequitable in that it gives ready opportunity for collusion and fraud and would deprive the state of its legitimate revenue, thereby defeating the purpose of the inheritance tax law. *Kerr's Estate,* 159 Pa. St. 512; *Hawley's Estate,* 214 Pa. St. 525; *English v. Crenshaw,* 120 Tenn. 531. Pennsylvania has since abandoned this theory. 29 Columbia Law Review, 1164.

The second line of cases holds that such a transfer is an assignment by the legatee of a portion of his legacy and consequently the taxability of the property is determined by strict adherence to the terms of the will and without reference to the ultimate disposition of the property. This proposition is supported by well-reasoned cases and is the law in many states. *MacKenzie v. Wright,* 31 Ariz. 272; *In re Estate of Graves,* 242 Ill. 212; *Baxter v. Treasurer and Receiver General,* 209 Mass. 459; *In re Murray's Estate,* 155 N. Y. Supp. 185; *Hastings v. Nesmith,* 188 Mass. 190; *Brandeis v. Atkins,* 204 Mass. 471; *Estate of Rossi,* 169 Cal. 148; 26 R. C. L. 232, sec. 204; 29 Columbia Law Review, 1164.

The third viewpoint is that the compromise payment is to be taxed as a devolution of property by death to the contestant if an heir at law. The portion transferred is considered as having been renounced by the legatee, as passing directly from the estate to the one who receives it, and that the will is inoperative to that extent. This position seems preferable to either of the other two, since the tax is intended to reach property acquired by virtue of some relation to a decedent.

By virtue of this theory the $25,010 involved in this action would pass by the intestate laws of this state because of some relation to the decedent as heirs at law, and would not deprive the state of revenue by agreement among the contestants, but could not be taxed against appellees herein, who never actually received any part of it. This was the position which the eminent trial judge must have taken, and which is ably supported by the following authorities: 29 Columbia Law Review,

1164; *Taylor v. State*, 40 Ga. App. 295; *People v. Rice*, 40 Colo. 508; *State v. Probate Court*, 143 Minn. 77; *In re Estate of Harold Thorson*, 150 Minn. 464; *In re Estate of Stone*, 132 Ia. 136; *Matter of Wolfe*, 179 N. Y. 599; *Matter of Cook*, 187 N. Y. 253; *Pepper's Estate*, 159 Pa. St. 508; *Kerr's Estate, supra; Benz v. Rogers*, 141 Minn. 93; *Hawley's Estate, supra; Taber's Estate*, 257 Pa. St. 81; *McCoy v. Gill*, 156 Fed. 985.

In *State v. Probate Court*, 143 Minn. 77, under a statute similar to ours, the court said: "The question presented is whether, where there is a purported will, the several beneficiaries therein shall pay the inheritance tax upon the amount actually received out of the estate according to a decree of distribution entered upon a good faith compromise between them, or should they each pay upon the portion designated as the share in the will? The fundamental principle in the whole inheritance tax law is to exact a tax upon the clear amount in money value received by each beneficiary, legatee or heir from a decedent's estate, by virtue of the provisions of a will, or the intestate law, or otherwise, for the tax reaches transfers made by a decedent in contemplation of death. The tax is upon the transfers by which a beneficiary, legatee or heir obtains a portion. It is not a tax upon the estate, but upon the privilege of receiving a portion thereof, and is to be computed on the clear value of the portion received. True, theoretically the transfer occurs upon the death of decedent, when it is accomplished either by will or the intestate law. And the act provides that the basis of computing the tax shall be upon the money value of the portion received as of the time of decedent's death, or as soon thereafter as it is practicable to ascertain its then true value. The intention of the act is to compute the tax upon the value of the property which is received by an heir, or legatee, out of a decedent's estate, and upon nothing else. While the law provides against evasions it also carefully guards the rights of the one from whom the tax is exacted by providing for a refund under certain

conditions. It tolerates neither evasions nor injustice nor inequalities. The law does not in terms provide that the tax shall be computed upon the will as written. The intent no doubt is to compute upon the portion received by each legatee or beneficiary.

"Where a decedent has attempted to transfer his estate by a purported will, there is frequently an uncertainty as to the persons who eventually will participate in the estate, and the amount or value of the portion to be received, and there is also a possibility that the transfer may after all be in virtue of the intestate law and not through the will. The will may turn out not properly executed, or invalid because of lack of testamentary capacity or the exertion of undue influence. Therefore, in case of a contest between the beneficiaries named in the will, or where the instrument is attacked by one claiming under the intestate law, the practical proposition is that there is no actual transfer of any portion of the estate until the final decree of distribution is made, or until a court of competent jurisdiction construes or determines the issue between the claimants. The decree so finally entered relates back, and, of course, makes the transfer effectual as of the date of death. But so far as concerns the state's right to charge inheritance tax against a transferee for an amount received, the decree must be deemed conclusive, unless entered collusively for the purpose of evading or diminishing the tax. The final determination of the courts speaks with authority concerning the transfer, the transferee, and the portion transferred. And the inheritance tax law no doubt intended that, where there was uncertainty or a contest, the tax should be computed according to the final adjudication between the parties. A contest may be tried out, but it may also be compromised. A final judgment or decree after a trial is no more effective or binding upon the parties than one entered pursuant to a compromise. In this case there was a valid compromise and a decree of distribution agreed upon."

State v. Probate Court, supra, and other cases suggest that another principle may be applied to the facts in the instant case. A beneficiary in this will might refuse to accept the portion given. Certainly if he refused to accept the gift, no tax could be collected with respect to him, because there has been no transfer to him. The right to renounce the privilege of accepting the legacy is neither denied nor forbidden by the statutes or any authorities which we have been able to find. Upon his effective renunciation the title to or ownership of the property making up the legacy remains in the estate to be disposed of under the terms of the will or under the intestate law of the state and is taxable in accordance with the nature of the ultimate devolution. Logically, it would seem to follow that, if a beneficiary may renounce the whole legacy, he may renounce a part, and the part so renounced is not subject to the tax as property transferred to him by the will. When a will contest has been amicably settled between the beneficiaries named in the will and the heirs at law and they have in good faith stipulated for a decree of distribution in accordance with the settlement and there is no intent thereby to evade or reduce the inheritance tax, the tax should be computed upon the portion received by each beneficiary under the decree.

This court adopts this theory which justly places the burden imposed by statute upon those who actually receive the money or property, encourages the settlement of litigation, is for the best interests of society, and preserves property otherwise dissipated in payment of fees and court costs for another generation, thus ultimately providing more revenue for the state of Nebraska.

Having taken this position, the court did not commit error in admitting evidence of the effect upon the property of the estate of the litigation growing out of the contest of the will, as it was admissible to show that the stipulation and settlement were entered into in good faith

without collusion of the parties to evade or reduce the inheritance tax.

The decree of the district court is

AFFIRMED.

VIVIAN FORBURGER, APPELLANT, V. CLARENCE FORBURGER, APPELLEE.

FILED MARCH 11, 1932. No. 28128.

1. **Divorce**: DENIAL OF DECREE. In a divorce proceeding, where each party seeks a divorce against the other on the ground of extreme cruelty, and it appears that each is guilty of acts which amount to extreme cruelty, a court of equity is justified in refusing a divorce to either.
2. ———: DIVORCE A MENSA ET THORO: MAINTENANCE. In a proceeding for divorce upon the ground of extreme cruelty, where the facts fairly establish recrimination and absolute divorce is denied, the evidence showing the disposition of the parties to be such as to make conjugal happiness impossible, the trial court has jurisdiction to grant a divorce to the wife *a mensa et thoro* and award her pecuniary relief by way of separate maintenance.
3. ———: MAINTENANCE: AMOUNT OF AWARD. A monetary award of separate maintenance to the wife should bear an equitable proportion to the husband's income.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed as modified.*

Beghtol & Foe and *J. Lee Rankin*, for appellant.

Perrin & Kier and *Perry, Van Pelt & Marti, contra.*

Heard before ROSE, GOOD and EBERLY, JJ., and CARTER and CHASE, District Judges.

CHASE, District Judge.

This is a suit for divorce brought by Vivian Forburger against her husband, Clarence Forburger. The wife was plaintiff below and the husband defendant, and for convenience we will refer to them as such herein.

The ground relied upon by the plaintiff for her divorce is extreme cruelty. The defendant answered denying the allegations of plaintiff's petition, and by way of cross-

petition alleged extreme cruelty, praying for a divorce from the plaintiff.

After a long and detailed trial lasting several days, the court refused a divorce to either party and ordered both the petition and cross-petition dismissed; but did find that the plaintiff was entitled to a divorce from the defendant from bed and board and entered a decree accordingly, awarding her the sum of $75 a month for separate maintenance.

The plaintiff appeals only from the monetary award allowed by the court for her separate maintenance. The defendant prosecutes a cross-appeal, not only from the order denying his divorce, but also from the decree granting the plaintiff a divorce from bed and board, and separate maintenance.

The record is quite voluminous, consisting of nearly 600 pages of typewritten matter, exclusive of a vast number of exhibits. The plaintiff, at the time she met the defendant, was married and had a husband living. The defendant was then living with his second wife, he having been previously divorced from his first. The parties seem to have been infatuated with each other from their first meeting, but, as will appear later, this infatuation was of short duration. As a result of this quite imaginary fancy, the plaintiff obtained a divorce from her husband and the defendant employed the same procedure to free himself from his wife.

These parties were married on December 23, 1929. The plaintiff is 37 years of age and has one child by her former marriage, and the defendant is 46 years of age and has three children by his first marriage. There are no children of this marriage.

A considerable portion of the record is taken up in detailing a long series of illicit relations existing between the parties prior to their marriage. The trial judge listened with commendable patience to the defendant's testimony of these premarital relations, which could not have been offered for any other purpose except to cast slander

and disgrace upon the plaintiff. Certainly the conduct of the parties prior to their marriage cannot be considered as bearing any material relation to the issues involved in a suit for dissolution of that relation. The defendant pleads his own dissolute conduct and introduces evidence in support thereof as a reason for obtaining a divorce from the plaintiff. We are aware of no principle of law or logic that will allow a party to reap any reward from his own wrongful conduct, and more especially against the other party to the suit with whom he is *particeps criminis*. This whole story convinces us that there exists between these parties such an incompatibility of disposition as would destroy all conjugal felicity, if it could be truthfully said that any had previously existed. Without the testimony presented by this record, it would be difficult for one to believe that such marked variations of human feeling could find habitation in the receptacle of a single mind. At one time we find the defendant balancing upon the pinnacle of amorous ecstasy, and at the next plunged into the lowest depths of hatred and malevolence, and while under the influence of such spells committed unwarranted acts of violence against the plaintiff, such as striking and kicking her. The plaintiff, too, seems to be capable of exhibiting a similar flexibility of temperament. At times she displays quite an uncommon affection for her husband, while at others she hurls at him vile and insulting epithets, commits assaults upon him, and finally in a fit of anger cast a stone through the window of his automobile.

The trial judge had the opportunity to observe, not only the demeanor of the parties themselves, but their witnesses, in giving their testimony, and the candor and fairness with which they testified; and after full hearing was either of the opinion that the extreme cruelty charged by both parties had not been sufficiently proved to justify a dissolution of the bonds of matrimony or that recrimination was established to such a degree that neither party was entitled to the intervention of a court of equity for

the relief sought. Both parties had the previous experience of married life, and in each instance the legitimate objects of matrimony had aborted. In the interest of society courts are justified in refusing divorces to persons who present such a history, especially when there is question as to whether the statutory grounds have been sufficiently established. The powers of a court of equity should not be employed to satisfy the mere wants or desires of the parties in order that they might be freed from a burdensome status cast upon them by law, unless good reasons therefor have been fairly established. We believe the trial court was eminently correct in denying to each of the parties an absolute divorce.

The question now left for consideration is whether or not the court erred in granting a divorce *a mensa et thoro*, and awarding separate maintenance. It appears that there is an almost total absence of affinity existing between these parties and the hope of their ever living together in an atmosphere of marital bliss has departed. The trial court, having assumed jurisdiction of the case, could render any decree determining the rights of the parties in accordance with equity and good conscience. After a review of the entire record, we would not feel justified in asserting that the trial court was incorrect in granting a divorce from bed and board. Social welfare will best be conserved by compelling parties, with histories such as these, to remain bound by the marriage ties, but if their dispositions are such that they cannot happily live together they should be permitted to live apart.

We have searched the record in vain to satisfy ourselves as to even the approximate financial worth of the defendant. The evidence showed the defendant to be a man of some wealth, but the amount thereof is veiled in uncertainty. It appears that at the time of the trial he had an income of between $14,000 to $15,000 a year as a salary from his stone business in the city of Lincoln, and in addition thereto that he had some income property, the amount and value of which is not definitely shown. It

would not be an unwarranted conclusion to draw from the facts that the defendant was, at the time his case was heard, enjoying a total income of between $16,000 and $18,000 a year. The defendant should be brought to realize that there are oftentimes financial hazards connected with matrimonial excursions such as the last one in which he finds himself involved. It would seem that an award of separate maintenance made by the trial court hardly bears a sufficient proportion to the defendant's income to be equitable. However, we should not be unmindful of the fact that business generally has suffered a diminution of profits in the last twelve months. The plaintiff, before her marriage, was a clerk in a department store and perhaps not earning as much as she asks the defendant to pay her, yet, due to the effect upon her social standing, which must follow from the airing of such salacious incidents as the defendant has insisted on bringing into this case, and from the scandal and contumely heaped upon her by the defendant, she, doubtless, has suffered some diminution in earning power. The rule to be adopted by courts in determining these questions should be only in furtherance of equity and justice, but they must be ever vigilant in order that designing women may not successfully employ the institution of marriage as a means of future affluence. In view of all the circumstances, we conclude that an award for her separate maintenance in the amount of $125 a month is not excessive and it is hereby increased to that amount.

The plaintiff asks further that a reasonable sum be allowed her attorney for the prosecution of her appeal herein. It appears from the record that the district court has dealt with the plaintiff's attorney with reasonable liberality up to this time. The only service left to be compensated for is the preparation for the appeal in this court. The plaintiff's attorney is hereby allowed the sum of $150 to be paid by the defendant for such service.

With the modification above indicated, the judgment is affirmed.

AFFIRMED AS MODIFIED.

G. A. STEINHEIMER COMPANY, APPELLEE, V. JOHN PODKOVICH, APPELLANT.

FILED MARCH 11, 1932. No. 28171.

1. **Master and Servant: WORKMEN'S COMPENSATION LAW: SPECIAL PROCEEDING: FINAL ORDER.** The workmen's compensation law is a special proceeding within the meaning of section 20-1902, Comp. St. 1929, and the order made by the trial court is a final order within the meaning of such section.
2. ———: ———: **JUDGMENT.** Under the workmen's compensation law the parties are entitled to a final and complete disposition of their cause, and failure on the part of the trial court to make such disposition constitutes error.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Reversed.*

Brome, Thomas & McGuire and *G. H. Seig,* for appellant.

Lee & Bremers, contra.

Heard before ROSE, GOOD and EBERLY, JJ., and BROADY and CHASE, District Judges.

CHASE, District Judge.

This is an appeal from a judgment of the district court in a case arising under the provisions of the workmen's compensation law. The trial court found that the total temporary disability which the employee had previously suffered had ceased, but ordered that the employee be placed for treatment under the care of Doctor Schrock for the purpose of determining whether permanent disability had resulted, and, if so, the extent thereof. The order required the doctor to report his findings within three months thereafter, and further ordered that, in the event such doctor decided an operation to be necessary, the payments for temporary disability be made at the rate of $15 a week during the time the operation may be complete. From this order the employee has appealed to this court.

A consideration of two propositions involved in this controversy will be sufficient for a complete determination

of the cause: First, will an appeal lie from an order of this character? Second, if so, did the trial court commit error in entering such an order? The appellee contends that the order made by the trial court is not appealable in that it is not a final order.

This court has held on numerous occasions that, generally speaking, only final orders are appealable, but a careful examination of section 20-1902, Comp. St. 1929, convinces us that the legislature intended to make an exception in cases of this character. This statute, among other things, provides as follows: "An order affecting a substantial right made in a special proceeding * * * is a 'final order' which may be vacated, modified, or reversed." Certainly the order under consideration here affects the substantial rights of the plaintiff.

The statute providing compensation for injured employees is a special one. The legislature therein undertakes to protect an injured employee and his family by awarding him compensation for injuries he sustains resulting from his employment. Unlike other actions for personal injuries, his rights are not based upon a tort or wrong, but grow out of the contractual relationship of master and servant. Only a limited class can resort to it for redress. In this sense the statute is *sui generis*. It is intended to be complete in itself and, ordinarily, resort need not be had to any other general statute to insure to the injured workman compensation for injuries he may have sustained during the course of and growing out of his employment. It provides special rules of pleading. It is calculated to afford an early hearing of the cause and secure to the injured employee speedy and accurate justice. This statute is a special one and comes within the provisions of the section above quoted. It follows, therefore, that the order made is final in cases of this character and hence is appealable. This same general doctrine has been announced by this court in *Schlesselman v. Travelers Ins. Co.*, 111 Neb. 65.

On the question of whether or not the court committed

an error in rendering judgment such as it did, it will be necessary to set forth a brief summary of the evidence. It appears that the appellant, John Podkovich, for a number of years had been employed as a painter and interior decorator by the A. G. Steinheimer Company, and for the past eight years, as such, had been earning about 90 cents an hour; that on January 12, 1930, while employed by the appellee, he was painting the interior of a building. While standing on a scaffold about ten feet in height, the scaffold broke, precipitating him to the cement floor below, fracturing the os calcis of the right foot, which, in ordinary parlance, is the heel bone. There is no question that the injury arose out of and in the course of the appellant's employment. Several physicians were called to give testimony as to the nature, extent and effect of such injuries.

Doctor Fouts and Doctor McQuiddy, members of the medical advisory board of the labor commissioner's office, testified that the appellant had received a fracture of the os calcis; that the bone formation on both sides of the ankle joint was increased in size; that the effect of this injury would be an impairment of the normal flexion of the foot; and that in their opinion appellant had suffered at least 25 per cent. permanent partial disability.

Doctor Rich, an instructor of surgery of the University of Nebraska, testified that from an examination he made of the appellant he noticed a considerable enlargement of his right foot; that this condition caused the patient pain in walking; that an operation for stabilization of the ankle would be advisable, but such an operation would destroy the flexion of the ankle joint and the ankle would remain stiff thereafter, but it would remove any pain that might result from walking; that in his present condition, taking into consideration that he was a painter and required to climb ladders and work upon scaffolding, he was of the opinion that the patient had suffered 100 per cent. disability of the ankle.

Doctor Robert Schrock, orthopedic surgeon, was called

as a witness for the appellant. He testified that he had examined the injured limb on two different occasions, the last being in May, 1931, at which time he took X-ray pictures; that he noticed the lateral motion of the appellant's ankle was about one-quarter normal, and also noticed a slight crepitation or grinding when this action is performed, and he was of opinion that the patient was suffering from at least 25 per cent. loss of the foot. Doctor Duncan also testified that he was of the opinion the appellant had suffered a 25 per cent. permanent partial loss of the use of his foot.

It will be noted that the trial court found the appellant was not suffering from any temporary total disability at the time, but ordered him committed to the care of a physician in order to determine whether the appellant was suffering a permanent disability, and its degree. The order further provided that, if the doctor should decide the appellant was suffering a permanent disability, he be required to report thereon within three months from the date of the order. The order further provided that, if the doctor should decide upon an operation, payments for temporary disability be given in the amount of $15 a week during the time the operation may be complete.

Under this order the compensation which had previously been paid to the appellant had ceased and determined during the period that he was placed under the observation of the doctor, or until the doctor made a report. The order appears to be somewhat inconsistent. In one paragraph it finds that the appellant was suffering from no temporary total disability, and yet he is committed to the charge of a physician in order that the physician may determine whether permanent disability exists, and its degree. It will be noted that the court finds no temporary total disability to exist. Under this order, in the event the physician should find any disability existing, the effect would be to leave the appellant without compensation until the physician makes this finding. Further, the duty

to determine the disability of the appellant, whether temporary total, temporary partial, permanent total, or permanent partial is transferred from the court to the physician, after the court has found that no temporary total disability existed.

We have a profound respect for the opinions of the learned trial judge, and have no hesitancy in stating that we believe his intention was to obtain results which he conceived to be for the best interests of the appellant. However, the question we are called upon to determine is whether or not appellant, as a matter of law, was entitled to a complete disposition of his case at the hands of the trial court. His rights, by the terms of the order, are certainly left in abeyance, as the compensation he was receiving has terminated, and no provision for other compensation was made or no finding that he is not entitled to any compensation, either temporary total, temporary partial, permanent total, or permanent partial. Such a finding as to one of these matters the appellant was entitled to receive at the hands of the trial court. An order should have been made, either finding the appellant was free from all disability, or finding the extent and nature of his disability and an award made therefor. A failure to do so constitutes error, for which the judgment is reversed and the cause remanded.

REVERSED.

IN RE ESTATE OF MICHAEL P. ABTS.
JOHN W. LANGLEY ET AL., APPELLEES, V. EMMA E. ABTS, APPELLANT.

FILED MARCH 11, 1932. No. 28043.

1. **Appeal: BILL OF EXCEPTIONS: AUTHENTICATION.** "The rule is settled that this court will, on its own motion, refuse to consider a document appearing in the record and purporting to be a bill of exceptions, when not authenticated as such by the certificate of the clerk of the trial court." *Union Stock Yards Nat. Bank v. Lamb*, 92 Neb. 608.

2. WILLS: CONTEST: UNDUE INFLUENCE: INSTRUCTIONS. In a will contest, where the will in question is not an unnatural one, ordinarily the conditions created by a marriage relation which has existed for a long time would have but very little value as a circumstance upon which to base a finding of undue influence, by a wife upon her husband, in securing the execution of a will in her favor; and the singling out of such fact and specifically directing the jurors' attention to it in an instruction would have a tendency to unduly stress its importance as evidence.
3. ———: ———: ———: ———. In a will contest, on the issues of mental capacity and undue influence, *held* error to instruct the jury as to the provisions made by law for a wife in her intestate husband's estate.

APPEAL from the district court for Platte county: FREDERICK L. SPEAR and LOUIS LIGHTNER, JUDGES. *Reversed.*

Garlow & Long, for appellant.

McElfresh & Walker, contra.

Heard before GOSS, C. J., EBERLY and PAINE, JJ., and BEGLEY and ELDRED, District Judges.

ELDRED, District Judge.

This is a will contest. Emma E. Abts, proponent and appellant, filed in the county court of Platte county a petition for probate of an instrument purporting to be the last will and testament of Michael P. Abts, deceased. John W. Langley, Susan Stupfel, Isabel Stupfel, and Alois Patsch, contestants and appellees, filed objections to the probate of the will. From the decree of the county court admitting the will to probate appeal was taken to the district court. On trial of the issues of mental capacity and undue influence before a jury in the district court, verdict was returned in favor of contestants on January 21, 1931, and on the same day judgment was entered on verdict denying probate of will. June 2, 1931, motion for judgment *non obstante veredicto* and motion for new trial on the part of the proponent were severally overruled. Proponent appeals.

It is urged by the contestants that the purported bill

of exceptions on file cannot be considered by this court for the reason that it has never been authenticated by the certificate of the clerk of the trial court, as provided by section 20-1922, Comp. St. 1929. The transcript and purported bill of exceptions are in separate volumes. No certificate of the clerk of the district court is attached to the bill of exceptions. The certificate to the transcript is dated June 17, 1931, and contains the clause, "I further certify that the bill of exceptions attached hereto is the original bill of exceptions filed in this office." The transcript was filed in the office of the clerk of this court June 30, 1931. The purported bill of exceptions now of record here appears to have been settled by the trial judge July 25, 1931, and filed in the office of the clerk of the district court September 5, 1931. It thus appears that the bill of exceptions now on file in this court was not on file in the office of the clerk of the district court at the time the clerk's certificate attached to the transcript was made. The certificate attached to the transcript could not, therefore, be made to apply to the purported bill of exceptions.

"The rule is settled that this court will, on its own motion, refuse to consider a document appearing in the record and purporting to be a bill of exceptions, when not authenticated as such by the certificate of the clerk of the trial court." *State Bank v. Bradstreet*, 89 Neb. 186; *Union Stock Yards Nat. Bank v. Lamb*, 92 Neb. 608. See *Dugger v. Smith*, 94 Neb. 552.

The bill of exceptions not being authenticated by the certificate of the clerk of the district court, the objection of appellees to its consideration is well taken, and it must be disregarded.

The first assignment of error challenges the sufficiency of the evidence to sustain the verdict.

"Assignments of error that require an examination of the evidence are unavailing on appeal in absence of a bill of exceptions." *Anthony Doll & Co. v. Strien*, 121 Neb. 43.

Complaint is made of the statement of the court in instruction No. 2, as to names of parties contesting. On

examination we conclude that the statement complained of is in harmony with the record.

The jury by instruction No. 9 were instructed as follows:

"You are instructed that in determining whether or not the will of August 3, 1930, was the result of undue influence, you should take into consideration all of the circumstances surrounding its execution, including the closeness of association between the deceased and his wife, Emma E. Abts, at and prior to the execution of the will, the opportunity of the wife to exercise influence upon the deceased in the disposition of his property, the previous attitude of the deceased in the disposition of his property, and the weakened condition of the deceased at and immediately prior to such execution, as bearing upon the matters of susceptibility to suggestions and whether or not he was more likely to respond to suggestions and influence in the disposition of his property than if he were not in such weakened condition."

The clause, "including the closeness of association between the deceased and his wife, Emma E. Abts, at and prior to the execution of the will, the opportunity of the wife to exercise influence upon the deceased in the disposition of his property," is criticized. Does not this language too emphatically direct the attention of the jury to the natural social relationship between husband and wife, and have a tendency to impress upon them the idea that they were to consider this natural relationship between such parties and their close association as a more important factor in determining the question of undue influence than should be given it? Where the marriage relationship is of long standing, and the will not an unnatural one, ordinarily the conditions created by such relationship would have but very little value as a circumstance upon which to base a finding of undue influence, by wife upon husband, in securing execution of a will in her favor, and the singling out of such fact and specifically directing the jurors' attention to it would have a tendency to unduly stress its importance as evidence.

In the statement of facts in appellant's brief it is stated: "In 1890, Michael P. Abts and Emma E. Abts were married and lived together until his death, which occurred on the 4th day of August, 1930. At date of their marriage neither had any property. Each of them was very industrious and frugal and by their joint efforts and frugality had, at the time of his death, accumulated considerable property (the items being set out, aggregating about $25,000). They never had any children." This statement as to the facts, not being controverted by appellees, will, for the purposes of this appeal, be taken as correct. The will, under such circumstances, would not be an unnatural one; and the presumption of undue influence to be drawn from the confidential relationship of husband and wife, if any, would be very slight. *Boggs v. Boggs,* 62 Neb. 274. The giving of instruction No. 9, with clause criticized, was prejudicial to appellant.

At the request of the contestants the jury were instructed:

"You are instructed that, in determining the issues herein, you may take into consideration the fact that the law of this state provides that in case of the death of a married man, leaving a widow and no children, in the absence of a will, the widow inherits one-half of the estate left by her husband in addition to certain allowances and specific property, and that in case such husband left a will, the widow is entitled to elect to take such statutory share if she is not satisfied with the share given her by the will."

We fail to see how this instruction could act as a guide or assist the jury in determining either the question of mental capacity or undue influence submitted to them; or any other issue properly considered by the jury in arriving at their verdict. It constituted something of an invitation for the jury to substitute their own judgment for the will of the testator as to what would be a proper disposition of testator's property, in view of what the law would give the widow if no will was made. Yet, it fell

short of furnishing the necessary information for that purpose, as it only advised them of a part of the provisions made by law in case the deceased died intestate; stating, "in the absence of a will, the widow inherits one-half of the estate left by her husband in addition to certain allowances and specific property," but failed to tell the jury what the "certain allowances and specific property" might be; leaving the jury to speculate as to that. If it were proper to advise the jury as to the law of descent in a case of this character then they should be fully advised and nothing be left for speculation.

The further clause in the instruction that, "in case such husband left a will, the widow is entitled to elect to take such statutory share if she is not satisfied with the share given her by the will," is also open to criticism. The jury, not being advised of what the statutory share might consist, were left not only to speculate or presume as to that, but to weigh the provisions made for her by the will in controversy and the prior will, referred to and set forth in the objections of the contestants in the transcript, with the provisions made by law, so far as set out in the instructions, and then determine whether she should have been satisfied. It would seem clear that this instruction suggested the consideration by the jury of matters that were not an issue in the case.

Errors are also urged in other instructions given by the court and in the refusal to give instructions requested by appellants. We have considered these other assignments, but as an examination of the evidence would be necessary to determine the applicability of the instructions and the rulings of the court as to the abstract proposition of law appearing correct, the assignments are unavailing.

REVERSED AND REMANDED.

GENERAL MOTORS ACCEPTANCE CORPORATION, APPELLEE, V. GEORGE SUTHERLAND: JOE CHANCELLOR, APPELLANT.

FILED MARCH 11, 1932. NO. 27978.

1. Sales on Condition: AFFIDAVIT: SIGNATURE. Signature to affidavit attached to conditional sale contract as required by section 36-208, Comp. St. 1929, need not appear at the end, if it appears in any part, was placed there by party, and is applicable to the whole circumstances of the affidavit.
2. ———: ———: SEAL. Generally, omission of seal is not fatal; purpose of affixing seal being merely to attest the genuineness of signature of officer.
3. ———: CONTRACT: ADMISSIBILITY IN EVIDENCE. A conditional sale contract may be received in evidence, notwithstanding the facts that the affiant's signature appears only in the body of the affidavit thereto attached, and the seal of the notary public is lacking.
4. Liens: CREATION: ESTABLISHMENT. All liens are created by law or contract, and to establish a lien the contract must be made with owner of property on which the lien is sought to be imposed.
5. Sales on Condition: VENDOR'S LIEN: ARTISAN'S LIEN: PRIORITIES. Generally, lien of artisan making repairs to chattel at instance of conditional vendee in possession is subordinate to rights of conditional vendor under contract of which artisan has constructive or actual notice.
6. ———: CONTRACT: PROVISION AS TO LIENS: ARTISAN'S LIEN. Provision of conditional sale contract under which automobile was sold requiring vendee to keep property free of tax liens and incumbrances negatived existence of implied authority on part of conditional vendee to have repairs made on credit of automobile.
7. Liens: CREATION. A lien is proprietary interest, at most a qualified ownership, and actually can only be created by owner.
8. Sales on Condition: ARTISAN'S LIEN. Section 52-201, Comp. St. 1929, giving possessory lien for repairs on automobile, does not warrant presumption that conditional vendee has authority to incumber automobile for repairs thereon without consent of vendor.
9. ———: ———. Repairer of automobile sold under conditional sale contract had no possessory lien under section 52-201, Comp. St. 1929, as against unpaid conditional vendor, in absence of showing that repairs were made at request of or with consent of conditional vendor or assignee.

APPEAL from the district court for Jefferson county: FREDERICK W. MESSMORE, JUDGE. *Affirmed.*

E. A. Wunder, for appellant.

Denney & Denney, Reed, Ramacciotti & Robinson and *Roman L. Hrushka, contra.*

Heard before ROSE, GOOD and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

LANDIS, District Judge.

Replevin by General Motors Acceptance Corporation, as plaintiff, against George Sutherland, Chancellor Garage and Tire Company and Joe Chancellor, defendants, to recover possession of an automobile. Plaintiff obtained judgment against all the defendants in the county court, and again in the district court, where jury was waived and trial had to the court. Defendant Joe Chancellor appeals.

There is no dispute as to the facts. According to admissions in the pleadings, stipulated facts and evidence, on June 3, 1929, C. B. Clarke, doing business as Clarke Motor Company, sold to George Sutherland a new Pontiac automobile on a conditional sale contract, under the terms of which the title to the automobile remained in the seller, until all payments had been made.

The Clarke Motor Company assigned all of its interest in and to the conditional sale contract and the property covered thereby to the plaintiff. A certified copy thereof was filed in the office of the county clerk on June 8, 1929.

The defendant carries on the business of an automobile repairer. While the automobile was in the possession of the conditional vendee Sutherland it was damaged, and in November, 1929, he placed it in the hands of the defendant for necessary repairs. The defendant made the repairs, charging therefor, for one front fender, $11.25; one splash apron, $4.75; one running board, $8.75; one hub cap, 75 cents; express on parts, $2.10; recharging battery, $1; painting fender and door, $15; labor, straight-

ening angle frame and fender and replacing the new parts, $36.40, total, $80. Conditional vendee paid $10 on the charges, $70 thereof remaining unpaid, and defendant refused to deliver the automobile until the balance was paid.

The conditions and agreements of the sale were not fulfilled and performed by the conditional vendee, and the plaintiff seeks possession of the automobile under the terms of the conditional sale contract. Defendant held possession of the automobile on the ground that the lien for repairs is superior to the interest of the plaintiff.

When the plaintiff offered the conditional sale contract, defendant interposed the objection: "Defendant Joe Chancellor objects to the introduction of the exhibit for the reason that it is incompetent, irrelevant and immaterial under the issues in this case, the claim of the defendant being based on an artisan's lien and not on a purchase or general creditor's lien; for the further reason that said exhibit purports to be a conditional sale contract and is not certified as provided by section 2464 of the statutes."

The section referred to provides: "Said copy shall have attached thereto an affidavit of such vendor or lessor, or his agent or attorney, which shall set forth the names of the vendor and vendee, or lessor or lessee, or description of the property transferred and the full and true interest of the vendor or lessor therein." Comp. St. 1929, sec. 36-208.

Defendant contends that, because the signature of the affiant, C. B. Clarke, appears only in the fore part of the affidavit, and because the seal of the notary is missing, the court committed error in receiving the exhibit in evidence. In his brief, in discussing this question, he says: "Under the issues as formed in this case the defendant was not justifying his possession as either purchaser or judgment creditor, being the only two classifications of persons to whom a proper filing of the certified copy would impart notice under section 36-208."

Before the objection was made, defendant stipulated: "That the amount due on plaintiff's claim, based on exhibit A attached to plaintiff's petition, from George Sutherland who is in default in this action is the amount rendered in the county court of $378. It is further stipulated that exhibit A is the original signed conditional sale contract sued on in this action and that the signatures thereon are the signatures of the parties together with the assignment of said contract to the plaintiff and that the plaintiff is the owner of said contract."

The affidavit to the filed copy of the contract was as defined by the statutes. It was signed by C. B. Clarke, and the notary says it was subscribed and sworn to before her over her signature as notary public. True the signature of C. B. Clarke was in the beginning of the affidavit rather than at the end. But the signature need not be at the end, if it appears in any part, was placed there by the party, and is applicable to the whole circumstance of the affidavit. The purpose of affixing a seal is merely to attest the genuineness of the signature of the officer. Its omission is not generally held to be fatal. The trial court properly overruled the objection of the defendant to the exhibit. *McAbee v. Gerarden,* 187 Wis. 399; 1 R. C. L. 769, sec. 13; 2 C. J. 357.

The important question is the determination of priorities of the respective claims to possession. Defendant contends that as artisan he has a lien on the automobile paramount to plaintiff. Defendant's possessory lien is based on section 52-201, Comp. St. 1929:

"Any person who makes, alters, repairs or in any way enhances the value of any vehicle, automobile, machinery, farm implement or tool, or shoes a horse or horses, or mule or mules, at the request of or with the consent of the owner, or owners thereof, shall have a lien on such vehicle, automobile, machinery, farm implement or tool, or horse or horses, mule or mules, while in his possession, for his reasonable or agreed charges for the work done or material furnished, and shall have the right to retain said property until said charges are paid."

Defendant repaired the automobile at the request of the conditional vendee. His charges were reasonable, and he retained the possession thereof for the unpaid charges until taken under the writ of replevin. Plaintiff is assignee of a prior filed conditional sale contract, and had no knowledge of the repairing done by defendant until the same was completed. Conditional vendee defaulted in his payments and plaintiff replevied the automobile.

The precise question here involved has never been determined by this court. Defendant cites cases from California, Minnesota, New York, and Wisconsin. The California statute creates a prior artisan's lien for repairs made at the request of the owner or legal possessor of the property. Deering Civil Code 1931, sec. 3051. The Minnesota statute gives a lien for work or material used in the repair of personal property at the request of the owner or legal possessor. Mason's Minn. St. 1927, sec. 8507. The statute also defines the term "owner" to include a conditional vendee or mortgagor in possession. Mason's Minn. St. 1927, sec. 8528. The New York statute provides that a repair-man should have a lien for work done at the instance or request of a conditional vendee in possession. 6 McKinney's Consolidated Laws of N. Y. sec. 184. The Wisconsin statute allows an artisan's lien for work done at the request of an owner or legal possessor of chattel property. 3 Wis. St. 1913, sec. 3343.

In *Cache Auto Co. v. Central Garage,* 63 Utah, 10, it is pointed out that, in states where the lien of an artisan has been entitled to priority, it was because of a statute which specifically so provided. The leading cases from many jurisdictions are considered and the conclusion reached that no lien on chattel property sold by conditional sale can be obtained by one making repairs at the instance of the conditional vendee, where the statute provides for such a lien when the repairs are made at the request of the owner.

According to the decisions in the states of Idaho, Maine, Utah, and Washington, which have statutes like Nebras-

ka, before the artisan can have any possessory lien on the automobile at all, the repairs must have been furnished at the request or with the consent of the owner. *Neitzel v. Lawrence,* 40 Idaho, 26; *Hartford Accident & Indemnity Co. v. Spofford,* 126 Me. 392; *Wilcox v. Mobley,* 116 Wash. 118; *Cache Auto Co. v. Central Garage, supra.*

If A loans his automobile to B for a pleasure trip, and without A's knowledge or consent an artisan repairs same at the request of B, could the artisan assert his possessory lien for reasonable repairs under section 52-201, *supra,* as against A? All liens are created by law or by contract, and to establish a lien the contract must be made with the owner of the property upon which a lien is sought to be imposed. Our statute says the repairs must be made at the request of the owner. It seems obvious in the supposed case that A could successfully replevin his automobile from the artisan.

As a general rule, the lien of an artisan making repairs to a chattel at the instance of the conditional vendee in possession is subordinate to the rights of the conditional vendor under a contract of conditional sale of which the artisan making the repairs has constructive or actual notice. *Hollis & Ray v. Isbell,* 124 Miss. 799; *Shaw v. Webb,* 131 Tenn. 173; *Small v. Robinson,* 69 Me. 425; *Baughman Automobile Co. v. Emanuel,* 137 Ga. 354; *Arnold v. Chandler Motors of R. I., Inc.,* 45 R. I. 469; *Ellis Motor Co. v. Hibbler,* 219 Ala. 53; *Culberson v. Lakella Iron Works,* 170 Ark. 813.

In a conditional sale contract the title does not pass by the delivery of the property to the conditional vendee. Under such a contract the conditional vendee is bound to do something as a condition precedent to the passing of the title to the property. The title does not pass until the condition is fulfilled, although the property is delivered into the possession of the conditional vendee.

Possession of the property by the conditional vendee does not clothe him with the indicia of ownership sufficient to prevent the conditional vendor from reclaiming

same from a *bona fide* purchaser from the conditional vendee. It has been held that the conditional vendee is only a "bailee" of the property. *King v. Bates*, 57 N. H. 446. Also, that the vendee is the equitable owner. *Railway Co. v. Lumber Co.*, 130 Tenn. 354. Mere possession is not proof of property. *McComb v. Donald's Admr.*, 82 Va. 903. In *Drummond Carriage Co. v. Mills*, 54 Neb. 417, our court by Chief Justice Harrison rendered an opinion, Commissioner Ragan dissenting, wherein a common-law lien for repairs was held superior to a prior recorded chattel mortgage. This decision was made previous to the enactment of section 52-201, *supra*, and announces the rule: "By operation of the common law, in the absence of any specific agreement, every person who has bestowed labor and skill on a chattel bailed to him for the purpose, and has thereby increased its value, has a lien on such chattel and may retain it until paid his reasonable charges for his services." The opinion concludes with the following: "We are not holding that in all cases, or generally, the common-law lien will override and be superior to the prior chattel mortgage lien, but that in cases where the mortgagor can be said to have expressed or implied authority from the mortgagee to procure repairs to be made on the mortgaged property it will be so."

The Maryland Court of Appeals in *Meyers v. Neely & Ensor Auto Co.*, 143 Md. 107, holds that the rights of the conditional vendor are inferior to the common-law lien of a mechanic who has made repairs on the property, where the circumstances of the sale were such as to imply a consent by the conditional vendor that the conditional vendee may have it repaired when necessary.

On the other hand, there are cases which deny that there is any implied consent from entrusting an automobile with the conditional vendee, which will subject the conditional vendor's interest to the right of a mechanic employed by the conditional vendee. *Arnold v. Chandler Motors of R. I., Inc.*, 45 R. I. 469; *Bath Motor Mart v. Miller*, 122 Me. 29.

It is to be noted that there is a marked difference between the position of a mortgagor and a conditional sale vendee. The former must own the property which he mortgages. He is commonly known as the owner. This is not true as to the conditional sale vendee. He holds possession under an executory contract to purchase. He may have acquired equitable rights in the property, but he is not the owner.

In the instant case the conditional vendee got a new automobile and contracted to "keep said property free of all taxes, liens and incumbrances; shall not use same illegally, improperly, or for hire;" so that any presumption of implied authority upon the part of the conditional vendee to have repairs made upon the credit of the automobile itself would do violence to the real understanding of the conditional sale contract. This very definite provision negatives the existence of an implied agreement. A lien is a proprietary interest, at most a qualified ownership, and usually can only be created by the owner. Where the statute gives a lien, and does not provide for the priorities, then it must be interpreted as consistent with prior law, there being nothing in it inconsistent with the well-established rule that a prior lien, duly recorded, gives a prior claim.

In *Rankin & Schatzell v. Scott*, 12 Wheat. (U. S.) 177, Chief Justice Marshall said: "The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant."

Defendant claims a lien by force of a statute, section 52-201, *supra*. This statute has no technical terms, is unambiguous, plain, and easily understood. To give the conditional sale vendee implied authority to create a lien for repairs involves the necessity of changing the literal meaning of the statute. This would violate a fundamental rule of construction that, unless technical words or terms

are used, they should be given their usual and ordinary meaning.

This section does not warrant the presumption that a conditional sale vendee has authority to incumber the automobile, the legal title to which is reserved in the conditional vendor, unless the consent of the vendor is shown by some conduct or act on its part aside from merely putting the conditional vendee in possession, and permitting him to use the automobile pending payment of the purchase price. Under our system of government the office of a judge is *jus dicere,* not *jus dare*—to interpret the law, not to make the law. The legislature makes the law, has declared it plainly.

The artisan who is not bound to accept an automobile for repairs, but only does so at his election, must regard section 52-201, *supra,* as not providing for a possessory lien as against the unpaid conditional vendor under a duly filed conditional sale contract, which forbids liens being created on the chattel, unless the repairs are made at the request or with the consent of the conditional sale vendor.

The judgment of the trial court is right and is

AFFIRMED.

NUTRENA FEED MILLS, INC., APPELLANT, V. SUPERIOR WHOLESALE GROCERY COMPANY, APPELLEE.

FILED MARCH 11, 1932. No. 28011.

1. **Banks and Banking**: DRAFT: COLLECTION: AGENCY. When a bank receives a sight draft for collection and remittance, it becomes the agent of the sender for such purpose.
2. ———: ———: PAYMENT. When a draft with a bill of lading attached is sent to a bank for collection and the drawee of the draft tenders to the bank its check on the collecting bank for the amount of the draft, the drawee being a depositor in the said bank with sufficient funds on deposit to pay the check, and the bank has sufficient cash on hand to pay the same, and the bank accepts and retains such check in payment of the draft, marks the draft "Paid" and delivers it to the drawee, together with the bill of lading, the draft and the account it represents are paid. The delivery and acceptance of the check, under such circumstances, is equivalent to payment in cash.

APPEAL from the district court for Nuckolls county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Borders, Borders & Warrick, T. W. Cole and *Cornelius Roach, Jr.*, for appellant.

Stubbs & Stubbs, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and Wright, District Judge.

WRIGHT, District Judge.

The plaintiff, Nutrena Feed Mills, Inc., appellant in this court, brought this action against the defendant, Superior Wholesale Grocery Company, a corporation engaged in the wholesale grocery business at Superior, Nebraska, for goods, wares and merchandise sold and delivered. The defendant answered, admitting the purchase and receipt of the goods and alleging payment therefor. Trial was had to the court without a jury. The findings were for the defendant and judgment entered dismissing the cause, from which plaintiff has appealed to this court.

The plaintiff shipped the merchandise in question to the defendant at Superior, Nebraska, and to insure payment at time of delivery drew a sight draft on the defendant for the amount of the purchase price, to which it attached the bill of lading for the merchandise shipped, and sent these two, through its bank at Kansas City, to the State Bank of Superior, Nebraska, for collection and remittance, with instructions to deliver the bill of lading upon payment of the draft. Upon receipt of notice from the State Bank of Superior that the draft was in its hands for collection, the defendant, acting through its president, personally delivered its check to the bank over the counter, for the full amount claimed. This check was drawn on the collecting bank against a deposit of the defendant with the bank, then more than sufficient to meet the same, and was by the bank accepted. Upon the receipt and acceptance of the check the bank marked the draft "Paid" and delivered the same, together with the bill of lading at-

tached, to the defendant. The bank at that time had on hand in cash in its vaults more than enough to pay this check and at that time was paying all checks of its depositors presented over the counter. The bank, however, failed to charge this check against the account of the defendant, and two days later, when it was taken over by the banking department of the state, the check was found among the other papers of the bank.

The plaintiff contends that the issuance and delivery of the check amounted to a conditional payment only; that since the check was not by the bank charged against the account of the defendant it was never honored and the defendant parted with nothing of value; that the collecting bank had authority only to collect and remit and could accept nothing but cash or its equivalent in payment, and that the mere issuance and delivery of the check did not constitute a payment of the collection item. The defendant, on the other hand, insists that when a draft with a bill of lading attached is sent to a bank for collection, and the drawee of the draft tenders to the bank a check on the collecting bank, the drawee of the draft being a depositor in the collecting bank with sufficient funds on deposit to pay the check and the bank has sufficient cash on hand to pay the check, if the bank accepts such check and marks the draft "Paid" and delivers it up to the drawee with the bill of lading, the draft and the account it represents are paid; that the check is, under such circumstances, equivalent to a payment in cash.

There seems to be no doubt that the State Bank of Superior was the agent of the plaintiff for the purpose of collecting and remitting the proceeds of the sight draft. *First Nat. Bank of Pawnee City v. Sprague,* 34 Neb. 318; *Omaha Nat. Bank v. Brady State Bank,* 113 Neb. 711; *Henefin v. Live Stock Nat. Bank,* 116 Neb. 331; *State v. Nebraska State Bank,* 120 Neb. 539.

The plaintiff contends, however, that, even though the bank was its agent, the mere passing over the bank counter of defendant's check, and the surrender of the bill of

lading together with the sight draft marked "Paid," did not constitute a payment of the debt, since the bank failed to charge the amount of the check on its books against the account of the defendant. In considering a somewhat similar situation this court, in *Scotts Bluff County v. First Nat. Bank,* 115 Neb. 273, held: "When a bank gives to one of its depositors credit in his pass-book for a check drawn by another of its depositors, having on its books ample funds to pay the check, such credit is equivalent to a payment of the check so deposited; and the depositor of the check is entitled to be considered a depositor of the cash represented by the check even though, without knowledge or connivance on his part, it was not entered on the books of the bank and the money was not further actually transferred." And in the opinion said: "No duty rested upon the treasurer (depositor) to see that the bank credited the deposit on its books, nor to see that the check was charged to Barton's (the drawer of the check) account on its books. The transaction was the same as if the bank had cashed Barton's check and then had entered the cash deposit in the pass-book to the credit of the treasurer."

While in this case there is no evidence that cash was actually counted out or physically appropriated to the payment of the plaintiff's draft, it is conclusively shown that the defendant presented its check which was accepted by the bank; that defendant had on deposit with the bank sufficient funds to pay the check and the bank had cash in its vaults more than sufficient to pay the amount and was then doing business in the usual manner, cashing all checks that were presented over its counter; and that upon receipt of the check it stamped the draft for which it was given "Paid" and delivered the same to the defendant. Under the circumstances, it became the duty of the bank to allocate a sufficient amount of its cash on hand to the payment of the check and from that time it held the amount as the funds of the plaintiff. It became no part of defendant's duty to follow the transaction further

or to ascertain whether the bank made the proper entries on its books to show the true situation.

The supreme court of South Dakota, having very much the same question before it, in *Marland Refining Co. v. Penn Soo Oil Co.*, 54 S. Dak. 10, said: "By giving the check to appellant's accredited agent, so much of respondent's money on deposit in the bank as was necessary to pay the check was segregated from his account and was in the possession of appellant through his said agent. In this case there was an agreement clearly implied that the giving of the check should be payment. Respondent had sufficient funds on deposit to pay the check, and the bank had sufficient funds on hand to pay it. It was the bank's duty to have charged the amount of the check to respondent's account and to have remitted the same to the appellant, but its failure to do so was not the fault of respondent, but of the bank who was acting as agent for appellant." Had the defendant in the present case presented its check and demanded cash, then given back the cash in payment of the draft, there could be no question that the bank then held it for the plaintiff. The result of the transaction was the same, and the fact that the parties did not go through the useless process of counting out the money and then transferring it back and forth would not change the situation. When the bank accepted the check and acknowledged the payment of the draft it amounted to a payment of the debt.

In *Andrew v. State Bank of Dexter*, 204 Ia. 565, that court held: "A bank which, as agent, receives for collection a draft, with orders to collect in cash only, and to remit to the owner of the draft, and which accepts in payments of the draft the amply protected check of the drawee upon itself, must be deemed to have collected the draft in cash, even though it fails either (1) to cancel the said check or (2) to charge the account of the drawer of the check with the amount thereof." And in the opinion the court, on the question of failure to cancel the check and make the proper charges on its books,

say: "Mechanical cancelation of the check and the process of recording items on the books were acts beyond the control of both the principal and Mr. Hammond. That was a matter of mere convenience to the agent, and could and did not affect the rights and equities of the parties or the merits of this controversy."

In this case the question arose on a claim of the principal for preferential payment out of the funds of the agent bank, it having become insolvent; but we can see no reason why the rule should be different in the present case. In each instance the delivery and acceptance of the check constituted payment, and the funds were thenceforth held by the collecting bank in trust for the principal.

The supreme court of Kansas in *Goodyear Tire & Rubber Co. v. Hanover State Bank,* 109 Kan. 772, where the payment was made as in this case by a check on the collecting bank against sufficient funds to meet the same, said: "The court is of the opinion that the rule applies that where a payment to a bank is made by a check drawn thereon the result is the same as though the depositor had presented his check, received the money over the counter, and then used it in making the payment."

Undoubtedly in those cases where the bank accepts a check when it does not have funds on hand to pay the amount or when a check is accepted drawn on another bank, which is dishonored, such acceptance by the collecting bank would not constitute payment. Under the facts in the present case we hold that the acceptance of the check by the agent bank amounted to a payment of the debt.

The judgment of the district court dismissing the action is

AFFIRMED.

EDWARD WOODRING, APPELLEE, V. COMMERCIAL CASUALTY INSURANCE COMPANY, APPELLANT.

FILED MARCH 11, 1932. No. 28039.

1. Insurance: POLICY: CONSTRUCTION. The terms and provisions of insurance policies which are prepared by the insurer will be construed most strongly against the party by whom the contract was drafted.
2. ———: ———: ———. The term "hired operator" used in a policy of insurance insuring against loss or disability following bodily injuries resulting from external, violent and accidental means while operating, driving, riding in, adjusting or cranking an automobile, and providing that it shall not cover loss suffered by a "hired operator," will not be construed to include a salesman while driving his employer's automobile as an incident to his employment in selling and delivering his employer's merchandise.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Affirmed.*

Harry W. Shackelford, for appellant.

J. J. Krajicek, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and WRIGHT, District Judge.

WRIGHT, District Judge.

This is an action brought by Edward Woodring, appellee, hereinafter referred to as plaintiff, against Commercial Casualty Insurance Company, of Newark, New Jersey, a corporation, appellant, hereinafter referred to as defendant, on an automobile accident insurance policy issued by the defendant. In the district court, at the conclusion of all the testimony, both plaintiff and defendant moved for a directed verdict. Thereupon, the court discharged the jury and entered judgment for plaintiff, from which defendant has appealed.

Under date of January 9, 1929, the defendant issued to plaintiff its "Superior Automobile Accident Policy," whereby it undertook, in consideration of the premium to it

paid, to insure the plaintiff for a stipulated term against loss or disability resulting directly and independently from bodily injuries effected solely through external, violent and accidental means while operating, driving, riding in, demonstrating, adjusting or cranking an automobile. The policy contained, however, the express provision: "This policy does not cover: (1) Any loss, fatal or otherwise, suffered by a hired operator."

The plaintiff, at the time he took the policy, gave his occupation as that of a "salesman." At that time he was employed in that capacity for a mineral springs company, and later was employed by Tall-One Bottling Company, selling its soft drinks. The president and manager of this company testified that his duties were selling soft drinks; "Going from customer to customer and soliciting business, and selling right off of the truck," the truck being furnished by the employer; that he was working for a salary of $15 a week, plus commissions. The plaintiff testified that on the day of the accident which caused his disability he was driving to Plattsmouth with his employer's truck partially loaded, to sell and deliver the bottled goods; that he was hired to sell and deliver his company's products; that his work did not always consist of delivering; "It was selling wherever I could, and if I had the goods, to deliver them. I took the orders." "I solicited new customers. That was the object in going to Plattsmouth." He had made one trip to Plattsmouth before to sell goods and had one customer and he had planned to make regular trips down there about once a week as he worked up trade enough to justify. On the day of the accident he was going down to call on this customer and also to see if he could work up some new trade. We think the evidence fairly establishes that his occupation was that of a "salesman" and that much of the time he took the merchandise with him and delivered as he sold. As an incident to the business he drove the automobile or truck on which he received his injury.

The defendant contends that the plaintiff was a "hired operator" of the truck he was driving and therefore the injury he suffered was not covered by the policy. This is the only question presented for our determination. The plaintiff insists that the term "hired operator" as used in the policy means a chauffeur or one who is paid for his skill in the operation of an automobile, and that under his employment he did not come within that class.

It has long been the rule of this court, consistently followed, that "Courts will construe policies of insurance more strongly against the party by whom the contract has been drafted, and who has had the time and opportunity to select, with care and ingenuity, and with a view to its own interests, the language in which the contract is couched." *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338. See *Haas v. Mutual Life Ins. Co.*, 84 Neb. 682; *Coad v. London Assurance Corporation*, 119 Neb. 188.

Under the facts here presented, we are not inclined to hold that where, as an incident in carrying on his occupation of selling merchandise for his employer, the plaintiff was required to or did drive the automobile or truck, he should therefore be classed as a "hired driver" within the meaning of the policy. We know of no instance where the term "hired driver" has been defined when used, as in the present case. The term "chauffeur" has been defined as "A man who drives an automobile for hire." 11 C. J. 746. And, again, as "One who manages the running of an automobile, especially the paid operator of a motor vehicle." Webster's International Dictionary.

In *People v. Dennis*, 166 N. Y. Supp. 318, the defendant was convicted of violating a statute providing that no person shall operate or drive a motor vehicle as chauffeur upon a public highway of this state unless such person shall have complied with the statutes. The defendant was an employee of a telephone company and his duties required him to drive an automobile in servicing the telephones of his employer's patrons. The employer furnished him a "Ford runabout" which he used for that

purpose. Naylon, Judge, speaking for the court in determining that the defendant did not come under the definition of a chauffeur as used in the statute, said: "I am unconvinced, by any legal definition or authority to which my attention has been directed, that the term 'chauffeur,' as employed in the law in question, is sufficiently comprehensive to include within its provisions a person whose only duty of driving a motor car is to convey himself and the tools and implements and materials that are necessary for him to use in the doing of his work to the place where he is called upon to perform such work. The only use he made of the motor car was merely incidental to his regular employment. His duties were principally and substantially those of repairing telephones that were out of order."

The Texas court of criminal appeals in *Matthews v. State*, 85 Tex. Cr. Rep. 469, in construing the statute of that state providing that no person shall employ for hire as a chauffeur of a motor vehicle any person not licensed as in the act provided, said: "Section 25 of said Act provides that 'An application for a license to operate a motor vehicle as a chauffeur (and by "chauffeur" is meant any person whose business or occupation is that he operates a motor vehicle for compensation, wages or hire),' etc. This definition as well as the provisions of this Act seem to apply to those who are known as chauffeurs and who operate motor vehicles as such chauffeur for compensation, wages or hire. This is a legislative definition, and by this the court should be governed. It would seem from reading the definition of 'chauffeur' that in order to bring him within that class he must operate the motor vehicle as such for compensation, wages or hire, and it would further seem this would apply directly to the fact or relation of driver of the vehicle for compensation, wages or hire, and would seem to exclude the idea that the vehicle was used as an incident to carry on the business." And further says: "So it would seem from a reading of the Texas statute, viewed in the light of the

general acceptation of the term 'chauffeur,' that where a license is required of the chauffeur for hire or wages, it has a direct relation to his employment to run the vehicle itself for hire and not as an incident to the delivery of the goods, wares and merchandise of his employer. The employment in the latter case is to take orders and deliver the goods, not to run the auto, the auto being used as an incident for the purpose of soliciting orders and delivery of the goods. The chauffeur as contemplated by the statute has a direct relation to the hire for operating the vehicle, while in soliciting and delivering goods it is an incident to his employment as a means of carrying on the business for which he receives no direct pay, as in this case."

The policy in the present case beyond question insures the plaintiff against loss from injury sustained while driving or riding in an automobile, and we are not willing to say that the mere fact that he was driving such automobile as an incident to his employment, for which he was receiving compensation, would bring him within the class of "hired drivers" so as to relieve the defendant from liability.

The judgment of the district court is affirmed, with an allowance of $100 for attorney's fee, to be taxed as costs in this court.

AFFIRMED.

STATE, EX REL. WALTER M. HERBERT, APPELLEE, V. WALTER S. ANDERSON, CHIEF OF POLICE OF THE CITY OF LINCOLN, ET AL., APPELLANTS.

FILED MARCH 17, 1932. No. 28096.

1. **Municipal Corporations: ZONING ORDINANCE: CONSTITUTIONALITY.** Ordinarily, a court will not declare an ordinance unconstitutional at the suit of one who is not injuriously affected thereby.
2. **Mandamus: PUBLIC OFFICERS.** Mandamus may issue against a public officer to compel him to act, when (1) the duty is imposed on him by law, (2) the duty still exists at the time the writ is applied for, and (3) the duty to act is clear.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Max Kier, Lloyd E. Chapman and *Clark Jeary*, for appellants.

Herman Ginsburg and *Joseph Ginsburg, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

GOSS, C. J.

Relator was granted a peremptory writ of mandamus against the chief of police, the mayor and the building inspector, as respondents, ordering them to file complaints, cause arrests and proceed to recover fines and penalties against violators of a zoning ordinance, affecting certain lots in the city of Lincoln. Respondents have appealed.

The city of Lincoln is a city of the first class and operates under a home rule charter. April 23, 1929, its council passed a zoning ordinance, numbered 3039, under the powers granted by section 15-1003, Comp. St. 1929. By it the real property located between Thirtieth and Thirty-second and Apple and Y streets was classified as a residence district. This included all of lot C and the west 250 feet of lot B, both being a subdivision of block one in Peck's Grove Addition to the city, as well as a tract 66 feet wide and about 145 feet deep (marked "vacated" and evidently intended originally for a street) lying between the lettered lots. The only other classifications into which the city is divided are apartment, local business, commercial, and industrial districts. Section 3 provided that no premises in the city should be used except in conformity with the provisions applying to the particular district where classified. It provided that a lawful use of premises at the time of adoption of the ordinance, though not in conformity with the provisions of the ordinance, might continue until such nonconforming use is abandoned. Section 4 affirmatively stated the uses to

which premises in a residence district might be put and prohibited other uses.

Relator lived about a block north of the premises involved. The tract is slightly irregular in its measurements. It is about 705 feet long east and west and about 145 feet deep. Lot C comprises the west portion of the tract. On the north, the east and the west of it are homes. Across Apple street on the south is lot D and south of that is the main-line track of the Missouri Pacific Railroad Company to Union, still south of which is a considerable tract of tillable land on which corn was grown in 1931. There are no residences on lots B, C, the "vacated" strip, and D. Lot C has a small street-car barn formerly used as a garage for street cars used on the Bethany line, the main line of which was operated on the south side of Y street. This car line has switch tracks from the main line running southwesterly to the barn from about the middle of the west 250 feet of lot B. The Missouri Pacific Railroad Company also had transfer tracks coming from the southwest and connecting with the street railroad tracks. There was also a so-called "industrial track" or stub by which the tract could be served by switching cars and leaving them on the tract without interfering with the other tracks.

While respondents suggest that the tract was eligible for classification for industrial uses, and that it was a mistake not to classify it thus, we are faced with the fact that it was not so classified when the ordinance was passed in 1930. On April 11, 1930, Tri-State Cement Products Company began on the "industrial tract," near the west end of lot B, the manufacture of concrete pipes. This operation continued until June 2, 1931, about four days after this action was begun. They had no building. The concrete mixer was carried on a conventional truck devised for that purpose and having an engine used only in moving it. The mixer itself had a four-cylinder motor for power used in elevating and mixing the ingredients and in dumping them into the forms. No more than sev-

en men were used at any time and the maximum number of 94-pound sacks of cement used in a day was about 65. The pipes manufactured were in nine sizes, varying from 12 inches in diameter to 60 inches. An inspection of the daily reports shows that there were not many larger than 36 inches. After setting over night the forms would be stripped and the manufactured pipe would be lifted and set out of the way of the next day's operation. Usually there were only two periods each day, of an hour or so each, in which the mixing was carried on. Sometimes there were three such periods.

Each sack of cement was lifted by a man and emptied. He then tossed the sack aside. These operations caused some cement to be liberated in the form of dust and to be carried varying distances, depending upon the wind. Considerable noise was made and some gaseous odors were emitted in the operation of the mixer and its motor. As we have already shown, the premises in question were clearly used for manufacturing concrete pipe. This would be classified under the ordinance as a use permissible only in an industrial district. Section 3 of the ordinance also prohibits the use "for any trade, industry or purpose that is noxious or offensive by reason of the emission of odor, dust, smoke, gas, fumes or noise." In respect of this the district court found that the business was operated in such a manner as to violate all of the restrictions above quoted. While there was evidence of the emission of dust that was offensive to some of the residents nearby, that was due rather to the manner of handling the cement sacks than to the inherent nature of the business; as to the emission of smoke, gas and the noise, it is doubtful that the evidence of these things alone was sufficient to constitute a violation of this general section 3 of the ordinance relating to all five types of districts. So we prefer to consider the case on the ground that the general use of the premises for the purpose of manufacturing pipe was a use unauthorized by its classification in the ordinance as a residence district, rather than upon the manner in which the actual use was conducted.

Section 3 of ordinance 3039 also provides that an existing lawful use of premises at the time of the adoption of the ordinance, though not in conformity with the provisions of the classification under the ordinance, may be continued. Under this theory of a nonconforming use, the respondents claim exemption from the control of the court as prayed and allowed by the writ. The evidence does show that at times in years past these premises had been used for the mixing of concrete, taken away for use elsewhere for paving and other purposes, that to some extent shipments of cars of hay, lumber and coal, and once a load of live stock, had been unloaded there and taken away. These acts were not regular or continuous as were the acts of the Cement Products Company. So we are of the opinion that the evidence amply justifies the finding of the trial court that such prior use was an entirely different use from that of the manufacturing of pipe carried on at and for over a year before the time this action was commenced; and that the plea and proof do not warrant the claim of respondents in relation to a prior nonconforming use.

Respondents suggest that the classification of the property as residential works a confiscation of the property—in violation of the Fourteenth Amendment of the Constitution of the United States, in violation of the Bill of Rights of the Nebraska Constitution, and unenforceable. If the owner of the premises were here in a case where the question of the constitutionality of the ordinance or any part of it was involved in the issues, we would consider that phase. In a general way, prior to its amendment, we have held this very ordinance constitutional as against a claim that it discriminated against an owner's right to use his residence property for business purposes or for a fraternity house. *City of Lincoln v. Foss,* 119 Neb. 666; *City of Lincoln v. Logan-Jones,* 120 Neb. 827. But the respondents are in no way injuriously affected by the classification of the premises in the ordinance passed by the present city council. The ordinance passed

under the home rule charter is subject to the same rules as to its constitutionality as if passed under the authority of a statute. The reason for this lies in the fact that in its proper realm the charter has the effect of a statute. *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51. Generally, "The court will not declare a statute unconstitutional at the suit of one who is not injuriously affected thereby." *State v. Hall,* 99 Neb. 95.

We believe the city council (who were made parties but dismissed) and the respondents acted in good faith but were mistaken as to their duties in the matter. The evidence shows they desired the zoning board of appeals to pass upon an application of the owners for a reclassification of the premises, the result of which they thought might do away with the necessity of filing complaints against violators of the ordinance as it then stood. Relator was not satisfied with this and demanded action Under the law and the terms of the zoning ordinance the duty of the respondents to prosecute the violations was clear. We have recently said: "To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear." *State v. Barstler, ante,* p. 167.

For the reasons stated, the judgment of the district court is

AFFIRMED.

U. S. THEATRE SUPPLY COMPANY, APPELLEE, V. WILLIAM H. CREAL ET AL., APPELLANTS.

FILED MARCH 17, 1932. No. 28168.

1. **Pleading:** DEMURRER. "A demurrer to a pleading admits the truth of the facts well pleaded for the purpose of determining their sufficiency as a cause of action or defense, but it does not admit the correctness of the conclusions of law drawn therefrom by the pleader." *American Water-Works Co. v. State,* 46 Neb. 194.

2. Fraud: PLEADING. "In an action to recover money alleged to have been obtained by misrepresentation, fraud, duress and deceit, the petition must set forth the facts showing such fraud, and a mere allegation of fraud or misrepresentation is not sufficient." *Chapman v. Meyers*, 84 Neb. 368.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Battelle, Travis & Strehlow, for appellants.

Lee & Bremers, contra.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY, DAY and PAINE, JJ.

GOSS, C. J.

Plaintiff, described as a corporation, sued defendants, described as a copartnership, on account for goods, wares and merchandise. Defendants answered, admitting the allegations of the petition, and then each defendant claimed a set-off on account of a certain note. Plaintiff demurred to the set-off; the demurrer was sustained; judgment was rendered for plaintiff on its account, motion for new trial was overruled, and defendants appealed.

The pleading of defendants is entitled "Answer and Set-Off." In three lines the answer admits on behalf of each defendant the allegations of the petition. Then follows the "Set-Off:"

"Further answering said petition, and by way of set-off, defendant William H. Creal alleges and shows to the court that:

"1. Under date of September 24, 1928, the said plaintiff, U. S. Theatre Supply Company, by and through its agents, F. H. Parker and William C. Raapke, owners of all the stock of said corporation, for valuable consideration, executed and delivered to defendants its certain promissory note in words and figures following, to wit:"

The note is for $750, dated September 24, 1928, due in two years, in favor of William H. Creal, and signed by F. H. Parker and William C. Raapke. The set-off of

Walter H. Creal, being the preamble and second paragraph of the pleading, is identical in every respect with that above quoted and abstracted, save that his name appears in place of William H. Creal. The rest of the pleading down to the prayer we quote:

"3. Said defendants and each of them allege that no sums have been paid them or either of them by the said F. H. Parker and/or William C. Raapke, either on the principal or interest of said notes; that there is now due and owing to defendant William H. Creal from the plaintiff by reason of said note the sum of $882.50 upon his set-off; and that there is due and owing defendant Walter H. Creal upon his set-off the sum of $882.50, together with interest thereon at the rate of six per cent. to be computed semi-annually.

"4. Further, defendants and each of them allege and show to the court that said F. H. Parker and William C. Raapke have no other properties or interests than those in the plaintiff corporation and the United States Scenic Studios, Inc.; that the effect of their relations in said corporation is merely that of copartners; that in the conduct of their business and particularly all the transactions out of which plaintiff's claim and the claims of these defendants and each of them arise were all on the same basis in so far as said F. H. Parker and William C. Raapke are concerned, and that they and each of them have the same interest in each of said transactions; that the organization and operation of their businesses under corporation names aforesaid are for the sole and only purpose of defrauding creditors; that unless the prayer of this pleading be granted the said F. H. Parker and William C. Raapke will be permitted to obtain and collect upon plaintiff's claim against these defendants, and these defendants will be unable to make collection in whole or in any part of their respective items of set-off."

The above reference to the United States Scenic Studios, Inc., is explained by stating that the second cause of action in the petition declared on an account for $13,

assigned to plaintiff as a debt of defendants to "the U. S. Scenic Studios, Inc., a corporation."

The demurrer challenged the set-off because (1) it showed on its face that it did not state facts sufficient to constitute a cause of action, set-off or counterclaim against the cause alleged in the petition, and (2) because it attempted to bring into this action improper parties defendant.

The only question to be decided is whether the demurrer was good as against the pleading of the defendants. The defendants had admitted in their answer that both the U. S. Theatre Supply Company, the plaintiff, and U. S. Scenic Studios, Inc., assignor of plaintiff's second cause of action, were corporations, organized under the laws of Nebraska; and admitted that the defendants William H. Creal and Walter H. Creal are a copartnership under the name and style of William Creal & Son.

This is the established rule: "A demurrer to a pleading admits the truth of the facts well pleaded for the purpose of determining their sufficiency as a cause of action or defense, but it does not admit the correctness of the conclusions of law drawn therefrom by the pleader." *American Water-Works Co. v. State*, 46 Neb. 194. See *State v. Ramsey*, 50 Neb. 166; *Bresee v. Preston*, 91 Neb. 174; *Salsbury v. City of Lincoln*, 117 Neb. 465; *Dobney v. Chicago & N. W. R. Co.*, 120 Neb. 824.

Down to paragraph 3 of the pleading of the defendants there is nothing that indicates any cause of action in favor of the defendants. Paragraph 3 alleges like amounts "now due and owing" from the plaintiff to each defendant by reason of his respective note; but this is not only contrary to the facts so far pleaded but is a pure conclusion of law.

Considering paragraph 4 as if Parker and Raapke were parties to the action (which they were not) and were owners of all the stock in plaintiff corporation (as suggested but not directly and affirmatively pleaded in paragraph 2) every material allegation is a conclusion with-

out basis in facts pleaded. Allegations that transactions are on the same basis without pleading the facts, that parties have the same interest in transactions without stating the facts for comparison and conclusion thereon, that the organization and operation of corporations by Parker and Raapke was for the purpose of defrauding creditors without pleading the facts from which fraud might be concluded, are insufficient. "In an action to recover money alleged to have been obtained by misrepresentation, fraud, duress and deceit, the petition must set forth the facts showing such fraud, and a mere allegation of fraud or misrepresentation is not sufficient." *Chapman v. Meyers*, 84 Neb. 368.

Tested by the fundamental rules heretofore stated, the pleading of the defendants did not state facts sufficient to constitute an affirmative cause of action on its set-off. It follows that the demurrer was properly sustained.

The conclusion we have reached makes it unnecessary to consider the second point of the demurrer. The judgment of the district court is

AFFIRMED.

METROPOLITAN LIFE INSURANCE COMPANY, APPELLEE, V. JOHN HEANY, APPELLANT.

FILED MARCH 17, 1932. No. 28194.

1. Judicial Sales: SETTING ASIDE: INADEQUACY OF PRICE. "A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake." *First Nat. Bank v. Hunt*, 101 Neb. 743.
2. Equity: DECREE: WRIT OF ASSISTANCE. Where not violative of any right or agreement as to possession, or where the issuance of the writ does not work injustice, chancery practice authorizes the issuance of a writ of assistance to give effect to the decree or judgment of an equity court.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

Edgar S. Hickey and *John A. McKenzie,* for appellant.

Cranny & Moore, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

GOSS, C. J.

This is an appeal from an order confirming the sale of 160 acres of land under a decree of foreclosure and awarding plaintiff purchaser a writ of assistance. The appellant relies on error because of inadequacy of sale price, error in confirming the sale over defendant's objection that a subsequent sale would realize a greater amount, and error in ordering the writ of assistance directing the sheriff to put the purchaser in possession.

The decree, dated July 2, 1930, awarded plaintiff a first lien for $11,873.70, at 10 per cent. from that date, and gave E. T. Collins a judgment lien for $5,298.75, bearing 8 per cent. from June 5, 1930, with $27.75 costs. Defendant took the nine months' statutory stay of the order of sale. The order was issued April 6, 1931, and the property was sold May 8, 1931, to plaintiff for $12,954.87. On objection of defendant another sale was ordered. It was had June 12, 1931. Plaintiff was the purchaser for $13,085.15. Again defendant objected to confirmation, chiefly as to inadequacy of amount. The court made an order giving him "until August 15, 1931, to find a purchaser who will raise the present bid by at least $500." On August 26, 1931, the court made an order confirming the sale to plaintiff.

On the subject of values, the parties stipulated to use the evidence on the objections to the first sale. That was done. There were only two oral witnesses for plaintiff, one of whom valued the land at $14,000 and the other placed its value at "between $90 and $100" an acre; and only the defendant testified for himself on the subject. He first placed the value at $22,000, but finally testified that it ought to bring over $100 an acre on a subsequent

sale. Defendant offered *ex parte* affidavits of five parties, who put the value at $22,000 to $24,000.

"A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake." *First Nat. Bank v. Hunt,* 101 Neb. 743; *Lindberg v. Tolle,* 121 Neb. 25. We think the court gave the defendant a fair opportunity to test the sale value put by himself and his witnesses, and that his inability to obtain one who would agree to raise the bid on the last sale at least $500 was sufficient to show that there was no gross inadequacy in the price for which the land sold and to authorize the court to confirm the sale.

In the absence of any showing of any agreement or alleged agreement subsequent to the decree giving defendant any rights to continue in possession or of any showing that the issuance of the writ might work injustice, we are of the opinion the court did not err in granting a writ of assistance as a part of the order confirming the sale. Such a writ is authorized by chancery practice to give effect to the decree and judgment of the court.

The judgment of the district court is

AFFIRMED.

LILLIAN G. NETUSIL, APPELLEE, V. JOHN J. NOVAK, APPELLANT.

FILED MARCH 17, 1932. No. 28147.

1. **Appeal: REVIEW.** Questions once determined on appeal will only be reexamined on a second appeal in exceptional instances of plain errors prejudicial to appellant.
2. ———: ———. An instruction, the giving of which was not assigned as error in the motion for a new trial, is not reviewable on appeal.
3. **Damages: LIABILITY FOR FRIGHT.** "There is a liability for damages for physical injuries which are proximately caused by fright and terror produced by one who owes a legal duty to the one injured." *Netusil v. Novak,* 120 Neb. 751, followed.

4. Animals: VICIOUS DOG: DUTY OF OWNER. "The owner of a dog, known by him to have vicious and mischievous propensities, owes a legal duty to every one to protect them from injury. He especially owes this duty to a traveler passing along the highway adjacent to his premises." *Netusil v. Novak*, 120 Neb. 751, followed.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Kennedy, Holland & De Lacy, for appellant.

Grenville P. North, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

ROSE, J.

This is an action to recover damages resulting from an attack on plaintiff by a dog known by its owner, the defendant, to be vicious. Defendant in his answer denied the facts on which the action was based and pleaded that the personal injuries of which complaint was made were not due to an attack by his dog. Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for $4,500, upon which judgment was entered. Later the trial judge, on his own motion, without ruling on defendant's motion for a new trial, set aside the judgment on the verdict and dismissed the action. From the dismissal plaintiff appealed. Upon a review in the supreme court the judgment of dismissal was reversed and the cause remanded, with directions to the court below to reinstate the verdict and the judgment thereon and to rule on the motion by defendant for a new trial. *Netusil v. Novak*, 120 Neb. 751.

In compliance with the mandate of the supreme court, the district court reinstated the verdict and the judgment for $4,500 and required plaintiff to remit therefrom $1,000 as a condition of overruling the motion of defendant for a new trial. Plaintiff filed the remittitur conditionally required. The motion for a new trial was overruled and defendant appealed from the judgment for $3,500.

Evidence tending to support the allegations of the petition was summarized in the former opinion wherein it was held that plaintiff made a case for the consideration of the jury. Evidence sufficient for a recovery and pertinent rules of law were explained on the first appeal. On the present appeal it was vigorously argued that the questions of law and fact considered on the former appeal should be reexamined and different conclusions reached. The exceptional course suggested has occasionally been taken, but there is no error in the rulings on the former appeal to call for a restatement of evidential facts or principles of law or for different conclusions.

An instruction is criticized in argument as erroneous and prejudicial, but it is not now subject to review, for the reason the giving of it was not assigned as error in the motion for a new trial.

Other questions are raised and discussed by defendant, but an error prejudicial to him has not been found. The judgment as reduced by remittitur is

AFFIRMED.

WILLIAM BURES, APPELLANT, V. EDWARD C. STEPHENS ET AL., APPELLEES.

FILED MARCH 17, 1932. No. 28068.

1. **Waters:** DRAINAGE. Owner may drain basin in natural course of drainage, discharging water in natural watercourse.
2. ———: ———. Where such drain is wholly on owner's land, there is no liability for damages.
3. **Easements:** DRAINAGE. An owner of a drainage ditch in continuous use for more than ten years acquires an easement for the purpose of drainage.
4. **Waters:** DRAINAGE: DAMAGES. One who sells a right of way for a drainage ditch, which empties into a natural watercourse thereon, and settles all damage resulting from said drainage cannot thereafter recover damages.
5. ———: ———: INCREASE OF USE. Cleaning out and deepening a ditch sufficient to drain a basin, for which an easement exists, does not increase the use beyond the original terms.

6. ———: ———: DAMAGES. Damages for use of an easement for a drainage ditch cannot be recovered by the owner of the servient estate against the owner of the easement, unless the owner is negligent in its use.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Bartos, Bartos & Placek, for appellant.

Sloans, Keenan & Corbitt, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, DAY and PAINE, JJ.

DAY, J.

This is a suit in equity to enjoin defendants from draining surface waters from their lands upon the plaintiff's land. The plaintiff appeals from a judgment in favor of defendants denying the injunction sought.

The plaintiff owns the E. ½ of the N. E. ¼ of section 2, township 6, range 2 west of the sixth P. M., and the several defendants own all the remainder of the section. Upon the land of the defendants there is a large basin embracing about 300 acres in which surface water collects. This basin has no natural outlet and until the construction of the artificial ditch, which is the subject of this controversy, the surface water collected and remained until it escaped by percolation and evaporation. For the purpose of draining this land within the basin, the predecessors in title to the parties herein entered into a contract, whereby the owners of defendants' land purchased from the then owners of plaintiff's land one acre and twelve square rods of land, for the purpose of maintaining an open ditch thereon, said purpose being part of the consideration for the deed. At the same time and as a part of the same transaction, the then owner of plaintiff's land was paid a certain sum in full for all damages which had accrued or might thereafter accrue in the future from the water flowing from said ditch. Pursuant to said agreement the drainage ditch was con-

structed in 1904, from the basin, and made to drain into a draw which was located on one of the defendants' land, which crossed plaintiff's land on its way to the creek. This ditch has been open and in use from that date.

Regardless of the deed and contract in this case, an owner of land has a right to drain a temporary basin or pond by means of an artificial ditch into a natural watercourse upon his own land. This right is given by statute. Sections 31-301 and 31-302, Comp. St. 1929, provide as follows:

"Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation."

"Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse."

This statute was first construed in *Aldritt v. Fleischauer*, 74 Neb. 66, wherein the court said that the right to drain in such a manner existed without it. This statute has engaged the attention of the court in *Muhleisen v. Krueger*, 120 Neb. 380; *Flesner v. Steinbruck*, 89 Neb. 129; *Mapes v. Bolton*, 89 Neb. 815; *Steiner v. Steiner*, 97 Neb. 449; *Beem v. Davis*, 111 Neb. 96; *Miksch v. Tassler*, 108 Neb. 208; and *Arthur v. Glover*, 82 Neb. 528. The appellant contends that the ditch does not follow the general course of drainage; that without the ditch the water would never run there. That is undoubtedly true, for without it the basin would not drain. We are of the opinion that the ditch carries the water in the general course of drainage. This question is not discussed because, for the reason hereafter given, it is unnecessary in this case.

In addition to this statutory right, the defendants con-

structed this ditch in 1904 and it has been in use ever since. The defendants have acquired an easement as against the plaintiff for the purpose of the drainage of their land. *Central Irrigation District v. Gering Irrigation District, ante,* p. 199, citing *Moll v. Hagerbaumer,* 98 Neb. 555, *Majerus v. Barton,* 92 Neb. 685, and *Dunbar v. O'Brien,* 117 Neb. 245.

It is argued by appellant that certain work done upon the ditch by the appellees in 1930 changed it by deepening, widening and lengthening it, so that the speed and volume of water was such that the situation was entirely changed, and as a result the damage was greater and different than contemplated by appellant and different from the right acquired by prescription. The evidence does not support this allegation. The work done in 1930 was necessary because the ditch had filled up during the years. It was necessary to clean it out as well as the laterals running into it. The volume of water was always the amount that would collect in the basin. In different years the volume would be larger or smaller depending upon the rainfall. But that is a variant incidental to the right to drainage. The ditch as it existed at the time of the trial was only deep enough to drain the basin, a thing the defendants had a right to do. There is no evidence of negligence in the prosecution of the work. The defendants would be liable to plaintiff for negligence in the construction and/or maintenance of the ditch. However, the evidence does not support a finding that plaintiff has suffered any damage resulting from the work done in 1930. The trial court found that the ditch was constructed and maintained in a careful and proper manner and causes the plaintiff's land no appreciable damage. We reach the same conclusion from the evidence.

Finally, this case is determined by the fact that the plaintiff's predecessor in title sold a strip of land to the defendants for the purpose of constructing this ditch and draining this basin. At the same time a settlement was

made for all future damages resulting from this drainage. The plaintiff cannot now complain of damages resulting from the creation of an easement across the land for drainage.

The judgment of the district court is

AFFIRMED.

ROY GROVER, APPELLANT, V. AARON FERER & SONS, APPELLEES.

FILED MARCH 17, 1932. No. 28121.

1. **Appeal:** FAILURE TO INSTRUCT. The trial court did not err in failing to instruct the jury as to a provision of the statute which was not pleaded or called to the court's attention by an appropriate instruction, or otherwise.
2. **Master and Servant:** INJURY TO SERVANT: ACTION FOR DAMAGES: INSTRUCTION. In a common-law action to recover damages for lead poisoning by an employee in a foundry, an instruction on assumption of risk is examined and approved.
3. **Appeal:** ISSUES: INSTRUCTIONS. Where the trial court has given a correct instruction covering the law of contributory negligence, and error is alleged because there was no specific allegation relating thereto in the answer, the character of the plea must be determined by all of the facts set out therein, and not by any particular language, and if the parties, by their introduction of evidence, have assumed that such a defense was in issue, it is not reversible error for the court to instruct thereon.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Affirmed.*

Albert W. Jefferis and *Reed, Ramacciotti & Robinson,* for appellant.

Kennedy, Holland & De Lacy and *Monsky, Katleman & Grodzinsky, contra.*

Heard before GOSS, C. J., DEAN and PAINE, JJ., and BROADY and RHOADES, District Judges.

PAINE, J.

The plaintiff, Roy Grover, was employed for a few weeks to work in the metal plant of the defendants in Omaha, and brought suit against them at common law for $40,000, alleging that he had contracted an occupational disease, known as lead poisoning, while in their employ. The jury returned a verdict in favor of the defendants. The plaintiff's motion and supplemental motion for a new trial having been overruled, he appeals to this court.

The amended and substituted petition, filed January 10, 1931, alleged that the defendants, Aaron Ferer & Sons, constitute a copartnership, consisting of the eight defendants named, and that their business is the purchase and sale of lead, copper, iron, and other metals, and the melting and refining thereof. The plaintiff entered their employ and worked for a few days in the junk yards, and then was directed to work in the melting room, where lead from old automobile batteries was melted in a large kettle, the aggregate weight of a single melting amounting to several tons, and plaintiff was directed to mix and stir certain chemicals therein. That one complete process required about nine hours, during which time a large quantity of poisonous dust, fumes and gases were constantly ascending from said kettle and impregnating the air in said room. That the defendants failed to furnish the plaintiff with a safe place to work, and failed to warn him of the latent and other dangers connected with said employment, and neglected to furnish any sort of mats or respirator to protect him from the dangerous effects of said fumes and gases, and that by reason of working therein, and under the conditions set out, the plaintiff became afflicted with lead poisoning, contracted because of the negligence of the defendants.

Defendants allege, in their amended answer, that plaintiff had had previous experience in foundries, where scrap lead was melted, and that he was familiar with the nature of the defendants' business and the condition of their plant, and that the risks, if any, therein were so open and

obvious to the plaintiff that they were assumed by him. Defendants deny that the plaintiff became afflicted with lead poisoning while working in their plant, but allege that, while plaintiff was employed by them, some hot water splashed upon his foot, causing him to jump, and, because of the fact that he was handling some metal at the same time, he strained his right arm, and deny that he received any injury whatever except the strained right arm, as set out above.

Defendants further charge that the records of the defendant company show that the plaintiff began work in the defendants' plant upon May 19, 1930, at which time he stated to one of the defendants that he had worked in a foundry in Kansas City; that after he worked for the defendants three or four days, sorting metal in the yards, he then worked on the big cutting shears, also out in the yard for five or six days, and thereafter worked at dumping the melted lead from a pipe running out from the bottom of a pot. The reply was a general denial.

Upon direct examination, the plaintiff stated that he worked six weeks in the foundry of the defendants, while the pay checks and time books showed that he started to work May 19 and quit work on June 20. He testified he worked part of the time in the yards and then worked for some days on the big shears before he went to work in the foundry.

Plaintiff testified that upon June 20, 1930, he reached down and got hold of a mould and turned it over, and that his wrist gave way and he let it drop, and it splashed hot water on his foot. He was given a slip and went to see Dr. Green, who put his wrist and arm under a light and then bandaged it, and that he went to see Dr. Green five or six different times; that his arm turned black, and swelled, and he was taken to the Nicholas Senn hospital; that shortly after the 4th of July he left the hospital, and then went back to see if the defendants would let him go back to work. Upon cross-examination, the plaintiff stated that he had worked three weeks at Council Bluffs

in the deaf and dumb school, had been on a farm for two months, where he got hit on the back of the right hand with an ear of corn. He testified that he had worked on different farms and in a logging camp, but he could only recall two places he had worked in the year 1929, being two months on a farm and three weeks at the deaf and dumb school in Council Bluffs, and the balance of the time he stayed at home with his mother. Before that, he was in Texas, came back to Kansas and was married, and then went back to Texas; that during 1928 he worked only enough to get gasoline for his car, as he was traveling around a good deal of the time. In 1927 he had worked three weeks for the American Radiator Company, filling moulds with sand, but quit work because he wanted to travel around.

The evidence disclosed that the foundry building is 60 feet long, 27 feet wide on one end and 45 feet wide at the other; that it has one window in the north end, the opening being 3 by 3 feet; that it has four windows on the east, with openings about four feet square; that it had a double door leading out to a platform about six feet four inches by eight feet; that there are three windows on the west side, the openings being larger than four feet square; that there is a large ventilator on the roof, with seven windows on the east side and seven windows on the west side; that this ventilator is 36 feet long and three feet two inches wide, and that in this there is an open louver, which is permanently open. Several photographs were introduced in evidence, showing the large ventilator in the top of the room and the location of the various equipment installed in the room. A large number of witnesses testified, and the bill of exceptions consisted of two large volumes.

Five errors of law are set out in appellant's brief as grounds for new trial: (1) The court erred in failing to instruct the jury as to the principles of statutory law applicable to plaintiff's cause of action; (2) the court erred in giving instructions numbered 8 and 11 as to the

assumption of risk, and in overruling plaintiff's thirteenth and sixteenth grounds for new trial, relating to said instructions numbered 8 and 11; (3) the court erred in giving instructions 5, 13, and 14, and in overruling plaintiff's tenth, eighteenth, nineteenth, and twenty-ninth grounds for new trial, whereby the issues of contributory negligence and comparative negligence, which were not in issue under the pleadings, were injected into the case for the consideration of the jury, and were necessarily prejudicial to the plaintiff's cause of action; (4) the court erred in giving undue prominence to the workmen's compensation law, when the same was not mentioned in defendants' answer, by giving instruction numbered 17; (5) the court erred in overruling appellant's supplemental motion for new trial because of newly discovered evidence.

1. The appellant first complains of the court's failure to instruct the jury concerning certain statutes applicable to the health and welfare of employees, and insists that the court should have instructed with reference to sections 48-403, 48-418, and 48-419, Comp. St. 1929. However, the appellant in his petition did not mention these provisions, nor call them to the court's attention, nor request any instructions with reference thereto, and no proof was offered that the plant was not constructed and operated, as to ventilators and windows, subject to the approval of the department of labor. The testimony shows that there was a blower or exhaust fan in the plant, near the south end of the melting room. The ventilators and the windows would tend to carry away the dust and fumes, as shown by the evidence. We see no reason which would require the court to instruct as to sections 48-418 and 48-419, Comp. St. 1929, as the evidence failed to show that any machinery was used in the melting room, or that such sections applied to this plant.

The court, in the tenth instruction, set out the law substantially as established by this court in the case of *Wiseman v. Carter White Lead Co.*, 100 Neb. 584, and we see no error therein.

The trial court did not err in failing to instruct the jury as to provisions of the statute which were not pleaded or called to the court's attention by offering an appropriate instruction, or otherwise.

2. In the second error relied upon for a reversal, complaint is made that instructions Nos. 8 and 11 do not state the law upon assumption of risk. In the recent case of *Campbell v. Chicago, R. I. & P. R. Co.*, 120 Neb. 499, we held: "An employee of mature years is taken to assume the risk of such dangers as are normally and necessarily incident to the occupation, whether he is aware of them or not." See *Walters v. Chicago G. W. R. Co.*, 98 Neb. 783.

The court, in the last part of instruction No. 11, said: "If you find that the plaintiff contracted lead poisoning or plumbism as a result of his employment with defendants, and further find that his injury was the result of a risk ordinarily incident to the performance of such work as he was doing, or if you find that his injuries resulted from dangers which were open, obvious and apparent to him or one of his understanding, or that were known by him, or that in the exercise of ordinary care should have been known by him, then the plaintiff cannot recover, and your verdict should be for the defendants." We cannot agree with the appellant that this instruction is contrary to the law, and we see no error therein.

3. The appellant, in his third proposition, charges that the court committed error by giving instructions setting out the law relating to contributory negligence, and that there was no specific allegation in the answer upon which to found such instruction. Our attention is called to the holdings that, where a servant continues to work with knowledge of dangers which an ordinarily prudent man would refuse to subject himself to, such servant is guilty of contributory negligence, especially where the danger is as open and obvious to the servant as to the master. 39 C. J. 838. It is contended by the appellee that the allegations of the answer amount in law to a plea of contribu-

tory negligence. The character of such plea must be determined by all the facts set up therein, and not by any particular language, and where each of the parties, by their introduction of evidence, have treated an issue as being raised in the pleadings, this court will not hold that the district judge was in error in instructing thereon. *Farnsworth v. Tampa Electric Co.*, 62 Fla. 166; *Pittsburgh, C., C. & St. L. R. Co. v. Cole*, 260 Fed. 357; *Fail v. Gulf States Steel Co.*, 205 Ala. 148; *Johnson v. Weskamp, ante*, p. 381.

The fourth ground for reversal insisted upon by the appellant is the undue prominence given by the court to the workmen's compensation law, as set out by the court in instructions No. 8 and in No. 17, which instructions told the jury that the suit on trial was for lead poisoning, and that they could not consider the accident which had occurred to the plaintiff when he dropped a mould and splashed hot water on one of his feet and strained one of his arms, as any disability resulting from that accident would come under the workmen's compensation law, for which accident he had been sent to the company doctor and treated for several days, and after which accident he had not worked for the defendant company at all; that the alleged error complained of was in the impression left with the jury, by these two instructions, that the workmen's compensation law was the important factor in the case, whereas there was no connection whatever between the accident and the alleged contracting of lead poisoning, for which this suit was brought under the common law, and appellant claims that without these two instructions the verdict would have been returned for the plaintiff.

The defendants admit that the plaintiff endeavored to show that no accident had happened to him on June 20, but the evidence discloses that an accident did happen, and plaintiff's arm was strained, and that he was given a slip which he took to the company's doctor, who treated him for several days, and, with this evidence before the jury, we see no error in the court giving the instructions mentioned.

The last ground insisted upon for reversal is based on newly discovered evidence, found in certain affidavits attached to the motion for a new trial, among them being the affidavits of two of the attorneys and of Joseph Anuskewicz, who was employed May 1, 1930, and who also had a suit for lead poisoning pending against the defendants, and in which he states that the day before the trial of the case at bar one of the defendants came to him and told him not to mention the dust or smoke or fumes in his evidence, and to say that the doors and windows were always open, and one of the attorneys told him to say it was all open and fresh air everywhere, and not a bad place to work, when the fact was that the room was always filled with heat and smoke and fumes and dust. In opposition to this last affidavit, the defendants submitted a counteraffidavit by the same Joseph Anuskewicz, in which he now states that he remembers that new respirators were brought to the foundry, and that he saw old respirators there that day, and that the smoke was bad in the foundry from about 9 o'clock to 10:30 in the morning, while the rubber was burning off from the battery tops, and that after that there was no smoke in the foundry, and that if he were again called to testify he would give the same testimony that he had originally given on the trial of the case at bar, and gave his reasons for signing the affidavit prepared by the attorneys for the appellant. We have carefully examined all of these affidavits, and this court has recently held: "If newly discovered evidence presents a material and important fact, germane to the issue in controversy, which, considered with the evidence presented on the trial, might cause a jury to take the other view, then a new trial should be granted, if diligence to secure the same has been shown." *Nelson v. State,* 121 Neb. 658. We do not consider that the evidence presented in the affidavits would add any new and important evidence which would cause the jury to change the verdict which they have rendered in the case.

Having examined all of the contentions set out by the

appellant with care, we are brought to the conclusion that the record shows that the case was carefully tried to the jury, that the instructions given were proper, and that no reversible error is to be found in this record, and the verdict of the jury for the defendants is sustained by the evidence. The judgment of the lower court is therefore

AFFIRMED.

VANCE SIEDLIK, APPELLANT, V. JOSEPH J. SCHNEIDER, APPELLEE.

FILED MARCH 17, 1932. NO. 28115.

1. Appeal: INFANTS: CONTRIBUTORY NEGLIGENCE: INSTRUCTION. A child of tender years is not chargeable with contributory negligence, and an instruction submitting that question to the jury is error.
2. ———: INSTRUCTION: REVERSAL. Where an instruction given to the jury is not founded upon either the law or the evidence in the case, and is calculated to mislead the jury, a verdict and judgment rendered in favor of the party aggrieved by the instruction will be set aside on appeal.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Reversed.*

John C. Barrett, for appellant.

James T. English and *Crofoot, Fraser, Connolly & Stryker, contra.*

Heard before GOSS, C. J., DEAN and PAINE, JJ., and BROADY and RHOADES, District Judges.

BROADY, District Judge.

This is an action to recover damages for personal injuries received in an automobile accident. The plaintiff is a boy seven years of age, and he, together with other boys of a like age, were playing football on a public municipal playground. Larger boys, among whom were high school students, were likewise playing ball and engaged in other athletic sports on other parts of the field, when

the defendant, a youth approximately twenty years of age, drove his father's car upon the grounds toward the group of smaller boys, who, at the approach of defendant's car, scattered. The plaintiff and the car collided. The plaintiff received injuries, consisting of a broken collar bone, both bones of the lower right leg fractured between the knee and the ankle, and plaintiff was unconscious for a time, probably due to a concussion of the brain. In two months' time the plaintiff had recovered so that he could engage in his usual activities, and while there was some testimony that the injured leg was a trifle shorter than the other his own doctors stated that his recovery was complete, and that the shortening of the leg was noticeable only with difficulty and only upon measurements, and stated that, in their opinion, the boy would make a complete recovery. There was no medical testimony in opposition to the foregoing. The jury returned a verdict in favor of the plaintiff for $250 from which he appeals to this court, claiming error (1) in the instruction of the court on the subject of contributory negligence of the plaintiff, and (2) that the verdict is inadequate. The defendant did not appeal.

The principal error complained of by the plaintiff was the instruction of the court relating to contributory negligence. The defendant in his answer denied negligence on his part, and directly pleaded contributory negligence on the part of the plaintiff, and in the forepart of the instructions the court so stated to the jury. In instruction numbered 10 the court first defined negligence; and in a separate paragraph defined contributory negligence, as follows: "By contributory negligence is meant any negligence of the plaintiff directly contributing to the accident." And in the same instruction followed a definition of slight and gross negligence.

In instruction numbered 6 the court, in the first paragraph, dealt with the general subject of the care required and duty of small children, or children of tender years. This was followed by a direction that, if the jury found

the plaintiff had exercised such care, he would not be guilty of *contributory negligence* and would be entitled to recover in this case. Then followed the third paragraph in which the court stated that if the plaintiff "was not using proper diligence commensurate with his age, discretion and experience, * * * and that had he exercised such care he would not have received the injuries by colliding with the defendant's automobile, then his own carelessness and failure to exercise such care would preclude any recovery in this action and your verdict should be for the defendant."

While the last part of instruction numbered 6, standing alone and without consideration to the first part thereof, and also apart from the reference to contributory negligence in instructions numbered 1 and 10, might not be construed as submitting to the jury the question of contributory negligence, if any, of the plaintiff, certainly under the whole of instruction numbered 10, when taken in connection with the other two instructions referred to, one cannot believe but that the jury must have considered that the contributory negligence of the plaintiff was submitted for their consideration.

A child of tender years—and it must be conceded that the plaintiff was a child of tender years—is not chargeable with negligence or with contributory negligence. *Sacca v. Omaha & C. B. Street R. Co.*, 98 Neb. 73; *De Griselles v. Gans*, 116 Neb. 835. That does not mean, however, that the defendant was the insurer of plaintiff's safety or that the defendant would be responsible for injuries received by the plaintiff which were caused by the recklessness or carelessness of the plaintiff alone with which there was no negligence on the part of the defendant. Contributory negligence presupposes some negligence on the part of both parties and that both are at fault at least to some degree. In determining whether the defendant was negligent at all the jury might well, and should, be told they could consider the acts and conduct of the plaintiff considering his age, discretion and experience.

"An instruction is erroneous which submits to the jury questions not within the issues in the case." *Linch v. Nebraska Buick Automobile Co.*, 120 Neb. 819. And it is prejudicial error to misstate in an instruction the law as to contributory negligence. To do so is sufficient to confuse the jury, and it is impossible to tell which rule the jury attempted to follow. *Gerish v. Hinchey*, 120 Neb. 51.

The defendant argues that the error, if any, was not detrimental to the plaintiff's interest, and since he recovered a verdict he could not have been prejudiced. Ordinarily that is true, but on the record before us we feel that there is no way of knowing but that the jury may have attempted to weigh, unguided, the degrees of negligence of the parties, when, under the law of this state, the plaintiff could not be chargeable with contributory negligence. "When an instruction is not founded upon the evidence (or law), and is calculated to mislead the jury in considering the facts of the case, the judgment must be reversed." *Mannion v. Talboy*, 76 Neb. 570; *Trute v. Holden*, 118 Neb. 449.

For the reasons above stated, we feel that there must be a retrial of this case; therefore the judgment is reversed and the cause remanded.

REVERSED.

W. H. HARDING V. STATE OF NEBRASKA.

FILED MARCH 17, 1932. NO. 28151.

1. **Burglary: PROOF.** Testimony of large foot tracks found about the affected premises immediately after a burglary, together with the fact that the accused had big feet, is not competent or sufficient to prove the accused guilty of the crime of breaking and entering.
2. ———: **SUFFICIENCY OF EVIDENCE.** Where the owner of a stolen welding machine is unable to identify the various separate parts of an identical make and model as those taken, other than that the manufacturer's serial number had been erased and his machine and all its parts disappeared at the same time and on the

same day as the accused, together with evidence of large foot tracks about the entered building from whence the machine had been taken and the fact that the accused possessed big feet, is not sufficient to sustain a verdict of guilty of one accused of burglary.

ERROR to the district court for Phelps county: J. W. JAMES, JUDGE. *Reversed.*

Frank A. Anderson, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

Heard before ROSE, GOOD and EBERLY, JJ., and BROADY and CHASE, District Judges.

BROADY, District Judge.

This is a criminal prosecution against the defendant on the charge of breaking and entering, or burglary. From a verdict of guilty and a sentence of one year in the penitentiary the defendant appeals on two principal grounds: First, that the court erred in not sustaining defendant's objection to testimony of footprints which was received in evidence; and, second, that the evidence is insufficient to sustain a verdict. There are other assignments of error which this court does not deem it necessary to consider.

The village of Loomis, of small population, is located in Phelps county. Approximately a week prior to July 13, 1930, the defendant came to Loomis and procured odd jobs in the neighboring harvest fields, during which time he lived at what is called the "shack" on the edge of the town, and which was located two or three blocks from a blacksmith shop belonging to James Anderson. The defendant had had some experience as a mechanic and had a few mechanical tools in his shack. During the time he was at Loomis he visited at the blacksmith shop and on one or two occasions was hired to do small jobs for the smith. During this time the blacksmith had shown the defendant his acetylene gas welding machine and the

parts and attachments thereto which were kept in the desk or bench drawer. During the nighttime of July 13 a slight rain had fallen so that foot tracks were visible the next morning. The next morning, July 14, when Anderson went to his shop he found the side window and the back door open and his welding machine gone. He called the sheriff and together they investigated the premises and found footprints made by a large shoe leading from the graveled highway across lots leading to the open window in the shop. The attachments and parts of the welding machine were all missing, and the footprints led from the rear door of the shop across the potato patch and vacant lots to the same point in the highway from whence the tracks coming in an opposite direction started, and on the highway were distinct marks of automobile tires. The blacksmith looked at the footprints, but left it to the sheriff to take the measurements, which the sheriff did by stepping with his own foot in the tracks, but he took no measuremnts. The sheriff said that the footprints were of a large foot, an inch longer and inch wider than his own shoes; and at the trial the defendant, who did not take the witness-stand, was referred to by the prosecution and the sheriff's attention called to his feet. The prosecution then asked the sheriff, in substance, how the size of the footprints compared with the size of the feet of defendant, who was then sitting in the courtroom. The sheriff replied that they were the same size.

The burglary complained of occurred on the night of July 13, 1930. On the afternoon preceding the burglary the defendant called upon the blacksmith and told him he was going to Kansas where he had work operating a threshing machine outfit and bade the blacksmith goodbye. He also paid the owner of the shack one dollar for rent and told him he was going to Kansas for a like purpose. The defendant was not again seen in the town or about the community until the following April when he was located in South Dakota, arrested and returned to

Phelps county. Inquiry at the place in Kansas where defendant said he was going disclosed that he was unknown.

One of the merchants in this town said that he saw the same footprints and made measurements of the tracks near the window and through the potato patch, taking measurements with a stick and also by himself stepping in the tracks, and that he also saw and took measurements of tracks near the gate or fence of the premises where defendant had lived. All of the tracks corresponded in size. There is no evidence whatever of any distinct mark in the footprints showing other than the ordinary shoe, except that they were larger than common. There is no other inference that the footprints were made by the defendant or that they were not made by some other person. The comparison of the size of the tracks with the defendant's feet as shown in the courtroom at the trial, approximately a year after the burglary, was wholly incompetent. At the trial, defendant's counsel called a witness, the chief of police of the town of Holdrege, merely identified him, and asked what size shoes he wore, to which the police officer replied, "Number 12." The witness was then excused. Reference was also made to other persons with large feet. The defendant's objection to this testimony should have been sustained.

When the defendant was arrested in Dakota, in April, he had in his possession a welding machine of the same make and pattern as that which disappeared from the blacksmith shop. While the tank did not appear in evidence, the attachments, consisting of ten or fifteen different parts, were produced. These consisted of two heads on each of which was fastened a gauge, several valves and brass connections, also two separate lengths of cloth-covered hose with brass couplings, and two or three brass, or copper, nozzles and tubes and a pair of goggles. In all probably ten or more such parts. The machine is known as a standard Smith welding outfit, model No. 62. The parts are all interchangeable and may be fastened and used on any other machine of a like model. The

owner of the blacksmith shop, Anderson, went with the sheriff to Dakota when the defendant was arrested and saw the attachments there. They were brought back to this state and at the prosecution Anderson was unable to identify any of these parts, except one of the tips was bent in a certain way that he recognized and identified, saying that he had dropped this tip at one time and that caused this bend. This tip, so-called, consisted of a brass or copper tube probably three-eighths of an inch in diameter, probably eight inches long, with a triangle at one end probably four inches long. He was shown each part separately, including the goggles, but could not identify any of them except the tip referred to. The manufacturer's serial number had been defaced, and when Anderson was asked how he could identify the parts, said, "Well, the serial number was gone. Q. That would be the only way you could identify it, would be by the serial number? A. Yes, sir; that is the only way." The prosecution went over with Anderson in great detail each of the parts. Anderson could identify none other than the tip referred to. Then Anderson was asked, "Q. Then is there any way by which you can identify the gauge which I have just handed to you as ever having been your property? A. Well, it all disappeared at the same time."

The court sustained an objection to further questions as follows: "No; he (Anderson) said that he couldn't say that was the piece or was his. There might be a thousand pieces of that kind, and he said he could not identify it as being from his shop." Then followed an argument between the county attorney and the judge, and the court said further: "There are thousands of that kind, and he said he could not identify it as being in his shop. He had one like it, but that is all that he can say."

From the foregoing it is beyond dispute that the evidence adduced at the trial was not sufficient to sustain the verdict. The testimony of the footprints was, under this record, incompetent and insufficient; and the trial court properly says there might be a thousand different

parts such as the prosecuting witness was trying to identify. Therefore, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

HARRY WIXSON, GUARDIAN, APPELLEE, V. NEBRASKA CONFERENCE ASSOCIATION OF SEVENTH DAY ADVENTISTS, APPELLANT.

FILED MARCH 17, 1932. No. 27998.

Gifts: UNDUE INFLUENCE: PRESUMPTION. When one of extreme age and infirm makes a conveyance of his or her property, without consideration and without independent advice, to one in a position of trust and confidence or in whom the donor places dependence for advice or spiritual guidance, *held* from such facts a presumption arises of undue influence, and the burden is upon the donee to overcome such presumption by evidence that is clear and satisfactory.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

John J. Ledwith, for appellant.

Sterling F. Mutz and *Edward C. Fisher, contra.*

Heard before ROSE, GOOD, DAY and PAINE, JJ., and LESLIE, District Judge.

LESLIE, District Judge.

This is an action brought by Harry Wixson, guardian of the person and estate of Amy E. Wixson, incompetent, against Nebraska Conference Association of Seventh Day Adventists.

Briefly, it is alleged in the petition that the ward had on the 10th day of July, 1928, certain building and loan stock of the value of $3,000, which the defendant, Nebraska Conference Association of the Seventh Day Adventists, induced her to assign to it without consideration. The plaintiff claims that this $3,000 represented practically all of the ward's estate; that she was at the time

mentally incompetent to manage her business affairs, and was persuaded by undue influence on the part of the defendant and its representatives to assign and transfer the certificate of stock, representing $3,000, to said association. The defendant by its answer admits that it received the certificate in controversy, but denies that Mrs. Wixson was incompetent to enter into the contract, or that undue influence was brought to bear upon her by the association, or any of its representatives, to induce her to turn the stock over to it. The cause was tried to a jury on these issues, and a verdict returned for the plaintiff. Motion for a new trial was overruled by the trial court, and the defendant has brought the case here on appeal.

A brief statement of facts will suffice. The plaintiff's ward, Amy E. Wixson, was at the time of the transaction involved 79 years of age, a widow, the mother of several children, a grandmother, a devout member of the Seventh Day Adventists church, and possessed of $3,000 in the Nebraska Central Building & Loan Association of Lincoln, and perhaps $500 worth of other property.

The contract, by which conveyance was made, was prepared at the office of the defendant association at Grand Island; one of its officers submitted it to Mrs. Wixson for execution before defendant's counsel at Lincoln, and subsequently she was escorted by the same officer of the defendant association to the building and loan association, where formal transfer was made of the stock to the defendant by Mrs. Wixson.

The record of the evidence is voluminous, but it is unnecessary to quote from it, since it is ample to sustain the verdict, assuming that the issues were submitted to the jury under proper instructions. We shall, therefore, consider the assignments of error in relation to instructions. The first of these relates to instruction No. 8 given by the court. This instruction is as follows:

"Where a person who is mentally infirm from old age and feeble of mind or diseased, and because of such condition may be easily persuaded, deals with another in

whom she reposes special trust, confidence or dependence either for advice or spiritual guidance, under circumstances which suggest an unfair advantage, undue influence or fraud, and without consideration, makes a voluntary gift or conveyance of all or nearly all of her property in an unnatural or improvident manner and without independent or disinterested advice, the law presumes that such gift or conveyance was obtained by undue influence, and the burden is upon the donee or person receiving the gift to prove by a preponderance of the evidence that the gift was fairly obtained and without undue influence and that it was the free and voluntary act of the giver. Therefore, if you find from the evidence that the plaintiff's ward, Amy E. Wixson, was old and mentally weak or so enfeebled by age or disease as to be readily susceptible of easy persuasion, and that she had placed trust, confidence or dependence in and upon the defendant conference or its agents, officers or ministers, and that the gift, as claimed by the defendant, represented all or nearly all of the property of the ward and was so improvident and ill-advised on her part as to leave her without means of support in her old age, and that the gift was made without independent or disinterested advice, and that the gift was an unnatural disposition of her property as ignoring the rights of her family, then you are instructed that the defendant must prove by a preponderance of the evidence that the transaction was voluntary, open and fair, and that there was no fraud, imposition or undue means, and that the ward understood the nature and the consequence of her act and that it was not done through the undue influence of the defendant or its agents."

The defendant's contention is that this instruction does not properly state the law, that it places the burden upon the defendant to prove that there was no undue influence, and contradicts instruction No. 2, which assumes to place the burden of proving undue influence and mental incapacity upon the plaintiff. Instruction No. 2 is as follows:

"You are instructed that in this case the burden is upon the plaintiff to prove by a preponderance of the evidence that the defendant, some of its officers, ministers or agents acting for and on behalf of the defendant, by some act or persuasion, or because of some special trust or confidence which Mrs. Amy E. Wixson imposed in such person, unduly influenced her to make the transfer or assignment in question."

Instruction No. 8 merely says, in substance, that if the jury find from the evidence that Mrs. Wixson was mentally so enfeebled by age or disease as to be easily susceptible of persuasion, and that she had placed trust or dependence in the defendant, and without consideration made a conveyance of nearly all of her property to the defendant without independent or disinterested advice, the law presumes that such conveyance was obtained by undue influence, and the burden is then upon the donee to rebut the presumption. We think this instruction correctly states the law.

In *Gibson v. Hammang*, 63 Neb. 349, the court held:

"Where a conveyance from a parent to one of several children * * * is not a just or reasonable disposition of the parent's property, and the age and physical condition of the parent, the proportion of the property conveyed to the whole estate, and the circumstances surrounding the gift suggest * * * undue influence, * * * the burden is upon the donee to overcome the presumption of fact arising from such circumstances."

In *In re Estate of Noren*, 119 Neb. 653, the court again held:

"It may be stated generally that, where a testator who is aged and infirm, with his mental faculties impaired, makes a will * * * in favor of a confidential adviser who is actively concerned in the execution thereof, and who receives * * * valuable property or rights under the will, there arises a presumption of undue influence, and * * * it devolves upon the beneficiary to overcome the presumption * * * by competent evidence sufficient for the purpose."

The rule announced in the foregoing cases has been consistently adhered to by the courts of this state and a majority of the other states. In some states it is held that, where a person of extreme age donates property to one in whom the donor has trust and confidence, lack of independent advice alone is sufficient to cast the burden upon the donee to prove that undue influence was not exerted to induce the donor to make the donation.

It is not necessary to discuss other assignments of error, as they relate largely to the refusal of the court to give certain instructions tendered by the defendant, and we are of the opinion that the instructions given by the court were sufficient.

Finding no reversible error, the judgment of the trial court is

AFFIRMED.

PAINE, J., dissenting.

I am entirely unable, after a careful study of the bill of exceptions and the briefs, to agree with the opinion adopted in this case. The facts as shown by the evidence disclose that Mrs. Wixson, a woman about 80 years of age, attended Adventist camp meetings for many summers; that at the Shelton meeting held in 1926 or 1927 she met two old ladies who told her that each of them had purchased annuities of the Nebraska Adventist organization, one in the amount of $2,000, and the other for $2,900. She thought this matter over for several years, but did not consult her children. It is proved beyond question that no minister, or officer of the organization, ever talked to her about this matter, or solicited this annuity, directly or indirectly, until she approached the president of the organization, Rev. S. G. Haughey, who signed all such documents. His testimony is that, at the close of a service in the Adventist camp meeting, held in Epworth Park, Lincoln, in August, 1928, as he was walking directly from the pavilion to his tent, Mrs. Wixson came up to him. "Q. Now, tell the jury what talk you had with Mrs. Wixson at that time. A. After pass-

ing the time of day and stating she was enjoying the meetings she said that she had a little business and mentioned the fact she had some money and wanted to know if the Conference didn't have provision to take it and allow an annual income from it; that was the way she approached me." In this conversation he told her the details of such an investment, and that they would pay 5 per cent. interest on an annuity, and she told him that was what she wanted. When he returned to his office in Grand Island, he had the same form of annuity contract drawn up that had already been used in some $30,000 of annuities in force in the state, and he returned to Lincoln upon September 10, 1928, with the treasurer, Rev. Marshall, and with Rev. Emery they took Mrs. Wixson to the office of Clarence G. Miles, an attorney, and handed the instrument to Mr. Miles, who did most of the talking with her, and testified as follows: "Q. Do you recall what you said in explaining the instrument to her? A. * * * My best recollection is that I explained to her or asked her if she knew she would never get this money back, that this was an annuity and she would only get the interest on it, and she said yes, she did. She said yes, she understood that. I asked her if she knew that at her death it would not go to her estate or her heirs but would be retained by this association which I see on this paper was the Nebraska Conference Association. I would not remember the exact name. I asked her if she knew that would be retained by the association at her death. She said, 'Yes; I am glad to make this gift.' She said, 'I have been thinking about it for some time.'" And his next answer is: "I then asked if she realized the full import of this and was satisfied to do this. She says, 'Yes; I am, I am glad to do it and it is not anybody's business.'" She then signed and acknowledged the annuity contract and it was signed by the two officers of the association, and on that contract she was regularly paid her 5 per cent. interest in semiannual payments. She did not tell her children of this for some months.

The evidence of Mr. Miles, an attorney and notary, is clear and convincing. In the case of *Little v. Curson,* 114 Neb. 752, it is said in the third paragraph of the syllabus: "The evidence of the attorney who prepared the deed, of the notary who took the acknowledgment, and of the witnesses to the execution of the deed, alleged to have been obtained by undue influence exerted by the grantee, that the deed was executed by the grantor understandingly and voluntarily, cannot ordinarily be overcome by evidence relating to different occasions."

The children of Mrs. Wixson charge that their mother was incompetent and that undue influence was practiced upon her by this church organization, but no proof thereof is submitted by them. Her son Harry, who is her guardian, testified that she told him she transferred it to the association because they paid her 1 per cent. more interest than the bank would pay her, and added that "banks went busted," but that "God was back of the Conference." He further testified that his mother did not approve of the children trying to get the money back from the church. Her son Silas also testified that she was incompetent, and that he had borrowed $300 of her so nobody else would get it, but admitted that she took a mortgage back on his threshing machine for security for the loan to him. To prove her incompetence, her children testified that she lived miserly, nearly starved herself, that she saved milk tops, old cans, and used bread wrappers for napkins, and insisted on wearing old, ragged and patched garments, and lived in a little three-room hut with her oldest son, a rheumatic cripple. No one testified to her incompetency except her own children, who may share the money after her death if it is recovered, and who have now placed her under guardianship. Against this evidence we find that of men who are not personally interested in the outcome of the case. H. F. Bauman, a coal dealer and neighbor, had had many deals with her, and was of the opinion that she was entirely competent. W. H. Crouse, another neighbor, considered her rational

in all her business dealings. George Adams, a leading attorney of Lincoln, to whom Mrs. Wixson went for advice in July, 1930, testified that she was, in his opinion, entirely competent. W. M. Folsom, of the Nebraska Central Building & Loan Association, testified to the same effect.

It is claimed that she parted with her money without consideration, yet the purchase of annuities is the most popular form of investment for old people in England, and many in this country regret not having purchased annuities. Upon what basis can this court declare that the purchase of a safe annuity, with a legal contract binding a large state-wide church organization, is entirely without consideration?

Upon this state of facts, the trial court gave instruction No. 2, set out in the opinion, in which it was rightly stated that the burden of proof of undue influence was upon the plaintiff alleging it, and in No. 6 the jury were told that there must be proof that the assignment was obtained by undue influence. *Latham v. Schaal,* 25 Neb. 535; *Seebrock v. Fedawa,* 30 Neb. 424. Commissioner Pound said, in *Boggs v. Boggs,* 62 Neb. 274: "Undue influence, in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own." And Judge Day said, *In re Estate of Bayer,* 119 Neb. 191, that, in such a case, suspicion or supposition of undue influence is not sufficient either to require the submission of the question to the jury or to sustain a verdict. Now, departing from the line of these decisions, the trial court, in instruction No. 8, set out in the opinion, in my judgment confused the jury by changing the burden of proof, under certain conditions not found in the evidence in this case, and instructed the jury that the burden shifts and requires the person receiving the gift to prove by a preponderance of the evidence that it was obtained without undue influence. The jury from this instruction would conclude that the judge considered that all of the requisite

conditions existed in this case, or the instruction would not have been given. The evidence in no way warranted the giving of instruction No. 8, and in my opinion this constituted reversible error.

If a determined old lady, who knows her own mind and without consulting her children, carries out her own wishes in that regard and buys an annuity contract, can have her wishes held for naught and the contract set aside upon evidence such as offered in this case, then no such annuity can stand in this state against such attacks. The entire evidence discloses that the conduct of the officers of this church organization was above reproach, for, even after she sought them out and asked for the investment, they did not press the matter, but gave her every opportunity to seek other advice and change her desires.

It is a matter of common knowledge that colleges, hospitals, homes for the aged, universities, ministerial benefit funds, missionary societies, American Bible Society, and many forms of individual church organizations, all seek to pledge payment of annuities on funds placed with them on practically the same form of contract as used in this case. If this decision becomes the law of Nebraska, it will be useless for such organizations to seek such deposits without securing the consent of all of the prospective heirs of the annuitant.

WILLIAM F. BRUETT, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

FILED MARCH 18, 1932. No. 28183.

1. **Municipal Corporations: CHARTER: AMENDMENT.** Section 17-A, art. IV of the home rule charter of the city of Omaha, does not amend or modify section 57, art. III of that charter.
2. **———: AIRPORTS: ISSUANCE OF BONDS.** Section 17-A, art. IV of the home rule charter of the city of Omaha, does not limit to $50,000 the amount of bonds which that city may issue in any one year, without being authorized by the electors, to pay for lands acquired by the exercise of the power of eminent domain, for the purpose of an addition to the city's municipal airport.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

Brome, Thomas & McGuire and *Amos Thomas,* for appellant.

John F. Moriarty, Harry B. Fleharty, Thomas J. O'Brien and *Bernard J. Boyle, contra.*

Heard before GOSS, C. J., ROSE, DEAN, EBERLY, DAY AND PAINE, JJ.

PER CURIAM.

As a resident taxpayer of the city of Omaha, plaintiff brought this action to enjoin the issuance of bonds by the city to pay for real estate acquired by the exercise of the power of eminent domain, for the purpose of an addition to the city municipal airport.

In effect, plaintiff alleged that the city was limited by its charter provisions to an issuance of bonds to the extent of $50,000 in any one year, for the purpose of paying for real estate for an airport, and that the city had exhausted its power by previously issuing bonds to that amount in the same year. A general demurrer to the petition was sustained. Plaintiff refused to further plead, and the action was dismissed. Plaintiff has appealed. The controversy depends upon the proper interpretation of certain provisions of the city's home rule charter.

The city of Omaha previously and during the same year had issued bonds to the extent of $50,000, under the provisions of section 17-A, art. IV of the charter (hereinafter referred to as section 17-A), and at the commencement of this action was about to issue bonds to the extent of $23,150, pursuant to the provisions of section 57, art. III of the charter (hereinafter referred to as section 57).

Plaintiff contends that section 17-A was enacted as an amendment to the charter, modifies or amends section 57, and, in effect, limits the power of the city to issue bonds to pay for lands for an airport, or an addition thereto, to the sum of $50,000 in any one year.

Section 57 is voluminous. It confers general powers upon the city council to purchase and acquire, by the exercise of the powers of eminent domain, property for many public purposes, and provides a complete scheme for the payment of lands so acquired. Pursuant to the provisions of this section the city had previously acquired land for an airport, and discovered that it was without funds with which to improve the air field. Thereupon section 17-A was adopted as an amendment to the charter. That section provides: "Notwithstanding the limitations contained in section 22, art. IV of the charter the council is authorized to issue and sell bonds of the city, without a vote of the electors, in the year 1929 and annually thereafter for five (5) years, to and including the year 1933, in an amount not to exceed fifty-thousand dollars ($50,000) in any one year. Bonds so issued shall be denominated 'Aviation Bonds' and the proceeds therefrom shall not be used for any other purpose than to acquire lands for use as an aviation field and to improve lands acquired and used as an aviation field."

It is contended that section 17-A imposes a limitation on the authority granted by section 57; that the latter section is a general provision and the former a special and therefore controls the general. Section 17-A does not purport to amend, modify or repeal section 57 or any of its provisions. The latter section authorizes the issuance of bonds, to pay for lands acquired for an airport, in an amount largely in excess of that provided by section 17-A. The amount so authorized is solely for the purpose of paying for the land, and not for any improvement thereof as an airport.

A charter provision in the home rule charter has the same force and effect as a statute. In Lewis' Sutherland, Statutory Construction (2d ed.) sec. 363, it is said: "If a statute is valid it is to have effect according to the purpose and intent of the lawmaker. The intent is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that intent.

'The intention of the legislature in enacting a law is the law itself, and must be enforced when ascertained, although it may not be consistent with the strict letter of the statute. Courts will not follow the letter of a statute when it leads away from the true intent and purpose of the legislature and to conclusions inconsistent with the general purpose of the act.' 'Intent is the spirit which gives life to a legislative enactment.'" And in section 364 of the same work it is said: "The intent of a statute being the law, it necessarily follows that the object of all interpretation is to find out that intent."

While the language of section 17-A, which provides that the proceeds from the bonds "shall not be used for any other purpose than to acquire lands for use as an aviation field and to improve lands acquired and used as an aviation field," may seem to imply a limitation of the power to pay for lands acquired for an air field, yet, when we take into consideration the purpose of its enactment, which was undoubtedly to provide for an additional fund with which to improve an air field, it would seem clear that the intent in the enactment of that section was not to curtail or limit the power given the council by the provisions of section 57.

We believe that the purpose and intent in enacting section 17-A was to give to the council a power additional to that granted in section 57, and not to limit the power granted by that section. It seems to be conceded that the defendant city and its officials have complied with every requisite of section 57 in the issuance of the bonds in question. We conclude that the city had the power which it sought to exercise, and that the trial court properly sustained the demurrer to plaintiff's petition.

It follows that the judgment of the district court should be and is

AFFIRMED.

SELMA L. SMITH, APPELLEE, V. CLIFFORD P. FALL, APPELLANT.

FILED MARCH 18, 1932. No. 28180.

1. **Evidence:** PRESUMPTION. "A 'presumption' is a rule of law that courts or juries shall or may draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disproved." Lawson, Law of Presumptive Evidence (2d ed.) 639.
2. ———: ———. If a particular fact upon which a presumption is required to be based is not shown to exist, then the presumption cannot be indulged.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Sackett & Brewster and *Loren H. Laughlin,* for appellant.

Burkett, Wilson, Brown, Wilson & Van Kirk, contra.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY, DAY and PAINE, JJ.

GOSS, C. J.

Plaintiff recovered a judgment as at common law for damages for injuries caused by negligence of defendant. Defendant appealed.

The petition, both in body and prayer, was in the usual form of a common-law action for damages. It was filed in Lancaster county May 14, 1930. It pleaded that plaintiff was a nurse employed by defendant in a hospital owned and operated by him at Beatrice, in Gage county, and was injured on May 21, 1929, through defendant's negligence, in a defective elevator, while she was riding in it in the duties of her employment. The petition did not state (1) whether either plaintiff or defendant had or had not elected (Comp. St. 1929, sec. 48-112) not to accept the provisions of Part II of the workmen's compensation law, or (2) whether or not defendant had provided compensation insurance or had furnished the compensation commissioner with proof of his financial ability to

pay compensation (Comp. St. 1929, sec. 48-146). Defendant was duly served with process while in Lancaster county. In a common-law action such service is good in the circumstances here shown. He specially appeared for that purpose only and objected to the jurisdiction of the Lancaster county district court. The objection was overruled. Defendant then demurred to the petition on the ground (1) that the court had no jurisdiction over the subject-matter, and (2) that the petition did not state facts sufficient to constitute a cause of action. When the cause came on to be heard on the demurrer, plaintiff requested and was given leave to amend her petition instanter by interlineation. She did this by interlining these words—"and plff states that the dft has rejected the compensation act." No allegation of such fact was in the petition as originally filed.

Thereupon defendant filed his special appearance for that purpose only and objected to the jurisdiction of the court over him on the ground that the petition, as amended, stated an entirely different cause of action against him than the original one in which summons was served on him. Having made no general appearance to this amended petition, he challenged the jurisdiction of the court over his person. The court overruled this special appearance. Defendant answered, preserving his objections to the jurisdiction. The cause was duly heard before a jury, resulting in a verdict and judgment against defendant.

Defendant's theory is that the original petition stated a cause of action under Part II of the compensation law. If it did so, the district court had no jurisdiction. For such claims must first be submitted to the compensation commissioner for an award. If either party is dissatisfied with the award, then the matter may be submitted to the district court. Comp. St. 1929, sec. 48-137. If the process served on defendant was based on an original petition for compensation, of which the district court had no original jurisdiction, then the amendment of the petition so as to

state a common-law action affirmatively was in effect the commencement of a new action in which it was necessary to serve defendant with process.

The real question therefore is whether the original petition stated a cause of action independent of Part II, as claimed by plaintiff, or whether it showed the parties to be under Part II of the compensation law, as asserted by defendant.

The application of section 48-112, Comp. St. 1929, is indispensable to the sustaining of the position of defendant. So much of that section as declares the elemental basis of the presumption to be indulged is quoted as follows:

"In the occupations described in section 97 (48-106) hereof, and all contracts of employment made after the taking effect of this act shall be presumed to have been made with reference, and subject to the provisions of Part II (48-109 to 48-115) hereof unless otherwise expressly stated in the contract, or unless written or printed notice has been given by either party to the other, as hereinafter provided, that he does not accept the provisions of Part II. Every such employer and every employee is presumed to accept and come under Part II hereof, unless prior to accident he shall signify his election not to accept or be bound by the provisions of Part II."

The call in the statute must find its affirmative answer in the pleading before the presumption becomes effective as an applicable rule of law. The very first element stated in the section is that it is applicable to "all contracts of employment made after the taking effect of this act." The legislative intent was that contracts of employment theretofore made were not affected. The act was approved, without any emergency clause, April 21, 1913. Laws 1913, ch. 198. Section 12 of this original act contained the exact phrase above quoted. The petition does not tell when the contract under which plaintiff was employed was made. It merely says: "That on or about the 21st day of May, 1929, and for some time prior thereto, plain-

tiff was employed by defendant in said hospital and sanitarium as a professional nurse." The objections to jurisdiction on behalf of defendant entitle him to a technical search of the petition. Plaintiff, reciprocally, is entitled to any fruits of such an examination. We do not know from the petition whether the contract of employment was "made after the taking effect of this act" or before. The petition alleges that plaintiff was 39 at the time of her injury. It is readily conceivable that she may have been employed by defendant as a nurse before the compensation law went into effect. If she was, then the contract would not be subject to Part II of the law.

"A 'presumption' is a rule of law that courts or juries shall or may draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disproved." Lawson, Law of Presumptive Evidence (2d ed.) 639. It follows that if a particular fact, upon which the rule requires the inference to be based, is not shown to exist, then the presumption cannot be indulged. This is especially true where, as here, the statute states the particular fact upon which the presumption must be based. In this instance, because it arises upon a special appearance and objection to the jurisdiction, we must find definite evidence of the particular fact within the language of the petition. No such fact appears there. Therefore the presumption does not exist. The district court was right in overruling the objections to the jurisdiction.

No assignments of error refer to any other subject. The judgment of the district court is

AFFIRMED.

FRED C. H. MEESKE ET AL., APPELLANTS, V. J. T. BAUMANN ET AL., APPELLEES.

FILED MARCH 18, 1932. No. 28079.

1. **Municipal Corporations: POWERS: EMPLOYMENT OF ATTORNEY.** Power of a city to sue and defend implies power to employ counsel for those purposes.

2. ———: ———: IMPLIED POWERS. A grant of official power necessarily implied from a specific provision of statute is part of the legislative act.
3. ———: ———: EMPLOYMENT OF SPECIAL ATTORNEY. A city having a regular salaried attorney is not for that reason prevented from employing special counsel in particular instances when the city attorney is absent or ill or disqualified.
4. ———: ———: ———. In particular instances when the city attorney is ill, or absent or disqualified, implied power of the city to employ special counsel to sue and defend is not taken away by subsequent enactments creating the office of city attorney, imposing upon him the duty to prosecute or defend all actions to which the city is a party and providing that for duties devolving upon any city officer compensation shall not be paid to any other person.
5. ———: ———: ———. When a salaried city attorney is ill or absent or disqualified, the making of a defense in a pending suit against the city is not a duty devolving upon a regular city officer within the meaning of a statute providing that the council shall not pay compensation to any other person.
6. ———: ———: ———. In absence or illness of a salaried city attorney, or in the event of his disqualification, a city having power to sue and defend may employ special counsel to dissolve a preliminary restraining order wrongfully granted to prevent the purchase of equipment for the city light plant and may also incur liability for payment of reasonable counsel fees, unless inhibited by statute.
7. Officers: DUTIES: PRESUMPTION. "The law presumes that a public officer faithfully performs official duty." *Paxton v. State*, 59 Neb. 460.
8. Pleading: DEMURRER. A petition challenged by demurrer charges what by reasonable and fair intendment may be implied from the facts stated.
9. Injunction: TEMPORARY RESTRAINING ORDER. The purpose of a temporary restraining order is to impose judicial restraint until litigants can be heard on application for a temporary injunction.
10. ———: ———: ACTION ON BOND: DAMAGES. In an action on a bond to pay all damages resulting from a preliminary restraining order, if wrongfully granted, obligees may recover expenses incurred in procuring the dissolution of the order, including reasonable counsel fees, where liability therefor is properly incurred.
11. ———: ———: ———: PETITION. In an action on a bond for a preliminary restraining order wrongfully granted and dis-

solved, obligees need not allege they paid reasonable counsel fees, legal obligation to do so being sufficient, if pleaded.

APPEAL from the district court for Cuming county: DE WITT C. CHASE, JUDGE. *Reversed.*

J. P. O'Gara, Perry, Van Pelt & Marti and *H. R. Ellenberger*, for appellants.

Zacek & Nicholson, contra.

Heard before ROSE, DEAN, GOOD and DAY, JJ., and THOMSEN, District Judge.

ROSE, J.

This is an action on a 2,000-dollar bond for a temporary restraining order which was wrongfully granted. The bond was executed and delivered by J. T. Baumann as principal and Otto H. Zacek as surety, obligors, in a former suit in equity for injunctive relief preventing obligees, Fred C. H. Meeske, John Benne, Fred Heilman, Roy Senden, and Henry Schwinch, who were respectively the mayor and the councilmen of West Point, from proceeding in a purpose to purchase an engine and other equipment for the city light plant. The order was dissolved on motion of obligees and the suit in which it was granted was subsequently dismissed. Obligees in the bond are plaintiffs herein and obligors are defendants. Plaintiffs claim unpaid damages in the sum of $1,287.35 for attorney fees and expenses, liability for which was incurred in procuring the dissolution of the temporary restraining order. To the petition in the action on the bond defendants interposed a general demurrer, which the trial court sustained. Plaintiffs elected to stand on their petition. Their action was dismissed and they appealed.

The sufficiency of the petition to state a cause of action on the bond is the question presented by the appeal. Plaintiffs allege the following as ultimate facts, in substance: They are respectively the mayor and the councilmen of West Point. In a suit for injunctive relief obligors procured a temporary restraining order and the ef-

fect thereof was to delay proceedings to purchase equipment for the West Point light plant. The restraining order was granted July 25, 1930, and went into effect the same day upon the giving of the bond which was duly executed, approved and delivered, a copy being attached to the petition as part of it. The bond binds obligors to pay obligees "All damages which they or any of them may sustain if it be finally decided that said restraining order ought not to have been granted." August 18, 1930, the restraining order was dissolved upon the hearing of a motion presented by obligees. The suit in equity for injunctive relief was dismissed by the district court. The final judgment therein determined that the restraining order ought not to have been granted and is in full force and effect, the time to appeal therefrom having long since expired. The resulting damages have not been paid. The facts thus summarized are alleged in detail. One paragraph of the petition in the present action follows:

"Plaintiffs have sustained damages to the amount of $1,287.35 by the granting of said restraining order, in that plaintiffs have necessarily incurred expenses in the sum of $1,287.35 as attorney fees and expenses in having said restraining order dissolved; that said expenditure was necessary because the hearing on the application for temporary order of injunction was set for September 29, 1930, and the restraining order, if not dissolved, would have remained in full effect until that date and would have prevented plaintiffs herein from performing the duties for which they were elected."

The sustaining of the demurrer and the dismissing of the action on the bond are assigned as error. In support of these rulings of the district court obligors, defendants, argue that it was the duty of the city attorney, a salaried officer, to act for West Point and for the mayor and the city council, and that those officers and the city were without power to incur liability for the fees and expenses which plaintiffs seek to recover. In support of these propositions the charter of cities of the second class to which

West Point belongs is invoked. The charter provides that the mayor with the consent of the council may appoint a city attorney to serve for a year. Comp. St. 1929, sec. 17-107. He is the legal adviser of the council and, when necessary, shall, on behalf of the city, prosecute or defend all actions in which it is a party. Comp. St. 1929, sec. 17-516. For performance of duties devolving upon any city officer the council shall not appropriate money to or pay any other person. Comp. St. 1929, sec. 17-517. In this connection counsel for defendants cite opinions of text-writers and courts to the effect that employment of special counsel to perform duties imposed by law upon the city attorney is unauthorized. At the bar there was a formidable argument in favor of the position thus taken, but whether it is tenable depends upon the allegations of the petition, the pertinent statutes and the presumptions of law.

As already indicated the petition pleads the allowance and dissolution of the restraining order, the execution and delivery of the bond, the dismissal of the equity suit for injunctive relief, the necessity for expenses incurred in procuring the dissolution of the restraining order, including attorney fees, and the condition upon which obligors became liable for unpaid damages.

In addition to the law relating to the city attorney and his duties, the statute provides that the city may sue and be sued. Comp. St. 1929, sec. 17-401. This means also the right to defend and implies power to employ counsel when a defense is necessary. *Cheesebrew v. Town of Point Pleasant,* 71 W. Va. 199. A grant of official power necessarily implied from a specific provision of statute is part of the legislative act. It has been wisely held that a city having a regular salaried city attorney is not for that reason prevented from recovering on an injunction bond reasonable fees of special counsel for services in dissolving the injunction. *Vicksburg Water Works Co. v. Vicksburg,* 99 Miss. 132, 33 L. R. A. n. s. 844, and note citing *Howard v. Burke,* 248 Ill. 224; *Ford-*

ham v. Thompson, 144 Ill. App. 342; *Luchini v. Police Jury,* 126 La. 972; *Babcock v. Reeves,* 149 Ala. 665. See, also, *Mollohan v. Cavender,* 75 W. Va. 36, and cases cited in note in L. R. A. 1917D, 255.

The power of the city to employ counsel, implied as it necessarily is from the legislative grant to sue and defend, is not wholly taken away by statutory provisions creating the office of city attorney, prescribing the duties of that officer and restricting payment of city funds to regular city officers and employees. Otherwise, absence, illness, refusal to act, hostility to public interest, or other temporary incapacity of the regular city attorney might leave the municipality without necessary counsel even in a grave emergency. When a salaried city attorney is ill or absent, or disqualified in a particular instance, the making of a defense in a pending suit against the city is not a duty devolving upon a regular city officer within the meaning of the statute providing that the council shall not pay compensation to any other person. Comp. St. 1929, sec. 17-517.

The power of the city to defend a suit to prevent the mayor and councilmen from buying essential equipment for the municipal light plant was granted by the city charter and the exercise of that power did not necessarily await the action of the city attorney, if ill or absent or otherwise temporarily incapacitated for official duty. If alleged liability for fees of special counsel was incurred by the mayor and councilmen on motion to dissolve the preliminary order, the presumption is that they performed their duties in that respect. "'The law presumes that a public officer faithfully performs official duty." *Paxton v. State,* 59 Neb. 460. A petition challenged by demurrer charges what by reasonable and fair intendment may be implied from the facts stated. *Roberts v. Samson,* 50 Neb. 745. The purpose of a temporary restraining order is to impose judicial restraint until litigants can be heard on an application for a temporary injunction. *Gyger v. Courtney,* 59 Neb. 555. According to the petition herein

the restraining order was granted July 25, 1930, and the hearing on the application for a temporary injunction was set for September 29, 1930. Between those dates the city would have been prevented from purchasing equipment for the light plant, except for the dissolution of the wrongful restraining order. The petition therefore shows an occasion for the removal of the judicial restraints imposed and for the services of counsel.

If the petition in the action on the bond, therefore, is viewed as a pleading demanding relief on behalf of the city, or of the mayor and councilmen officially, it does not seem to be demurrable for want of municipal power to incur liability for reasonable fees for services of special counsel in procuring the dissolution of the restraining order.

The result is the same if the action on the bond is viewed as a demand for the enforcement of individual, as distinguished from municipal, rights. The city is not a party to this action on the bond. The individual persons who held the offices of mayor and councilmen are plaintiffs herein. The bond itself is part of their petition and it shows that, with the city, they were sued as individuals in the former suit for injunctive relief. Referring to obligors and to the parties named in the suit in which the preliminary restraining order was granted, obligors bound themselves as follows:

"We, J. T. Baumann, one of the above named plaintiffs, as principal, and Otto H. Zacek, as sureties, do hereby undertake to said defendants in the sum of $2,000 that said plaintiffs will pay to said defendants all damages which they or any of them may sustain if it be finally decided that said restraining order ought not to have been granted."

If plaintiffs herein were sued in equity as individuals, as shown by the bond, and if they incurred liability for necessary counsel fees in procuring the dissolution of the restraining order, as stated in their petition, their pleading brought them within the terms of the bond. In any

aspect of the petition it does not seem to be open to a general demurrer.

Under the circumstances disclosed, necessary expenses incurred in procuring the dissolution of the restraining order, including reasonable counsel fees, may be recoverable in an action on the bond. *Gyger v. Courtney,* 59 Neb. 555; *Trester v. Pike,* 60 Neb. 510. Other cases to the same effect are collected in a note in 16 L. R. A. n. s. 55. The courts of the country are almost unanimous in the opinion that, in an action on such a bond, obligees need not allege they paid counsel fees, legal obligation to do so being sufficient, if pleaded. See note in 16 L. R. A. n. s. 76. In view of the law and the facts outlined, the general demurrer was erroneously sustained. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

GEORGE F. HOWELL, APPELLEE, V. WILLIAM F. POFF ET AL., APPELLANTS.

FILED MARCH 18, 1932. No. 28144.

1. **Receivers**: APPOINTMENT: APPEAL. A Nebraska statute authorizes an appeal from an order appointing a receiver. Comp. St. 1929, sec. 20-1090.
2. **Corporations**: DIRECTORS: TRUSTEES. A director of a corporation bears to it and its stockholders a fiduciary relation and is treated by courts of equity as a trustee.
3. ———: ———: ACCOUNTABILITY. A director of a corporation should refrain from all acts inconsistent with his corporate duties and is accountable as trustee.
4. ———: ———: ———. The accountability of a director, president and manager of a corporation is determined by the strict standards of rectitude that bind a fiduciary.
5. ———: OFFICERS: COMPENSATION. The president and manager of a corporation is not entitled to profits beyond the earnings of his stock, proper compensation and expenses.
6. ———: ———: DUTIES. It is the continuing duty of a president, manager and director of a corporation to keep an accurate account of its expenses and earnings and to make the data available to stockholders.

7. ———: RECEIVERS: APPOINTMENT: EVIDENCE. Duties of the managing officer and controlling stockholder of a corporation, and disregard thereof, may be considered with proof of other facts in determining the merits of an application for a receiver.
8. ———: ———: ———: DISCRETION OF COURT. An application for a receiver for a corporation is directed to the sound discretion of the court and except for an abuse thereof the conclusion reached will not generally be disturbed on appeal.
9. ———: ———: ———: EVIDENCE. A petition positively verified by the oath of plaintiff may be considered with supporting affidavits on the hearing of a preliminary motion for the appointment of a receiver for a corporation named as defendant, though the facts stated in the petition are contradicted by other affidavits resisting the application.
10. Receivers: APPEAL. An order overruling a motion to vacate the appointment of a receiver is not appealable.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Gerald E. La Violette and *Harry B. Fleharty*, for appellants.

Frost, Hammes & Nimtz, contra.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY, DAY and PAINE, JJ.

ROSE, J.

This is a suit in equity for an accounting and for the appointment of a receiver for the City Ice Company of Omaha, a solvent corporation engaged in manufacturing and selling ice. The shares of corporate stock were owned by George F. Howell and William F. Poff. Howell, plaintiff, was minority stockholder, director and secretary. Poff was controlling stockholder, director, president and manager. Poff, City Ice Company, and Poff doing business as Dundee Ice Company are defendants. The petition states a cause of action for an accounting. Alleged wrongs necessitating the appointment of a receiver are attributed by plaintiff to Poff and include fraud; engaging in hostile enterprises; making and retaining secret profits; misappropriation and conversion of corporate funds; neglect of duty; concealing data relating to busi-

ness transactions; failure to keep the manufacturing property in repair; permitting ice plant, equipment, machinery and buildings to deteriorate, thus causing waste and loss. The trial court heard the application for a receiver on the petition and on supporting and resisting affidavits and ruled in favor of plaintiff. Exercising a statutory right, Poff and the other defendants appealed from the order appointing the receiver. Comp. St. 1929, sec. 20-1090; *McCord, Brady & Co. v. Weil,* 33 Neb. 868.

It is contended by defendants that the City Ice Company has long been a solvent corporation making profits for its stockholders; that plaintiff accepted corporate earnings for years without complaining of the management, knowing as director and secretary what the president and manager had done, and consequently is not entitled to relief in equity; that alleged wrongs are denied, but, if found to exist, can be fully redressed without the appointment of a receiver; that no reason for taking the management away from the corporation has been shown; that more harm would result from a receivership than from future management by the corportion itself; that allegations of the petition, when contradicted by affidavits, as they are, should not be considered evidence on application for the appointment of a receiver; that the order appointing a receiver should be reversed. The contention that the City Ice Company is solvent and that its business is profitable seems to be well founded, but the other propositions submitted require attention.

A director of a corporation bears to it and its stockholders a fiduciary relation and is treated by courts of equity as a trustee. He is accountable as such and should refrain from all acts inconsistent with his corporate duties. *Nebraska Power Co. v. Koenig,* 93 Neb. 68; *Bodie v. Robertson,* 113 Neb. 408. The accountability of a director, president and manager of a corporation is determined by the strict standards of rectitude that bind a fiduciary. Poff was not entitled to profits beyond the earnings of his stock, proper compensation for services,

and expenses. It was his continuing duty as director, president and manager to keep an accurate account of the expenses and earnings of the corporation and to make the correct data available to stockholders. He was not entitled to make for himself secret profits from the business of the corporation. It was his duty to account for the results of his acts as a fiduciary without being asked. *Baird v. Lane*, 115 Neb. 413. These rules of equity and the duties of the managing officer and controlling stockholder of the corporation, and disregard thereof, may be considered with proof of other facts in determining the merits of the application for a receiver. The inquiry is directed to the discretion of the court and, except for an abuse thereof, the conclusion reached will not generally be disturbed on appeal. 4 C. J. 804.

Defendants take the position that the allegations of the petition, though positively verified by oath, when contradicted by affidavits, must be disregarded as evidence on the hearing of the application for a receiver. This position does not seem to be tenable. The course generally pursued has been outlined as follows:

"Ordinarily the evidence heard on a motion for the appointment of a receiver consists of the sworn pleadings of the parties and such affidavits or depositions as may, within the rules of practice, be offered on either side." 53 C. J. 64. See, also, *Farmers & Merchants Bank v. German Nat. Bank*, 59 Neb. 229.

The petition and affidavits on behalf of plaintiff tend to show the following summarized facts: In addition to the City Ice Company, Poff conducted for his own benefit an ice business in the name of the "Dundee Ice Company;" allowed and received unauthorized salary increases as president and manager of the City Ice Company; used corporate funds for his own individual purposes; entrusted to others the performance of duties devolving upon himself as manager; subjected the City Ice Company to penalties and high rates of interest by failing to pay taxes before they became delinquent; sold below cost to

himself, in the name of the Dundee Ice Company, ice belonging to the City Ice Company, thus making a secret profit resulting in a corresponding loss to the corporation of which he was president and manager; took ice at $3 a ton from the supply of the City Ice Company, though it was required to pay $4 a ton when compelled to buy ice to supply customers; used employees and equipment of the City Ice Company for the benefit of the Dundee Ice Company; failed to keep complete accounts of corporate transactions; impaired efficiency of the ice plant and caused waste and loss by neglecting to make necessary repairs; allowed the building and machinery to deteriorate for want of essential upkeep; unnecessarily closed the ice plant temporarily during hot weather when the demand for ice increased.

The facts summarized were stated in detail in the petition or in affidavits on behalf of plaintiffs. Though contradicted by affidavits resisting the application for a receiver, the showing by plaintiff seems to be the more convincing. The finding on appeal is that the showing on behalf of plaintiff was sufficient to justify the appointment of a receiver, but this conclusion will not determine any other fact upon a trial of the cause on its merits.

Defendants brought up also a record of proceedings on an application for an order dissolving the appointment of a receiver, but it is not a final order and presents nothing for review on this appeal.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. STATE BANK OF BELVIDERE, APPELLANT: JOE M. BURBACH ET AL., APPELLEES.

FILED MARCH 18, 1932. No. 28150.

1. **Banks and Banking: GUARANTY FUND: DRAFTS.** The purchaser of a bank draft is a purchaser of a bank's credit and a holder of exchange, and, as such, is entitled to share *pro rata* with depositors and other holders of exchange in the assets of a

failed state bank and in the depositors' final settlement fund, but, in the absence of special circumstances, is not entitled to have his claim allowed as a trust fund.

2. ———: ———: STATUTORY PROVISION. The former rule, that a bank check or a draft is an assignment *pro tanto* of the fund in the drawee bank, having been changed by statute (Comp. St. 1929, sec. 62-1606), the decisions in *Fonner v. Smith*, 31 Neb. 107, *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803, and *Falls City State Bank v. Wehrli*, 68 Neb. 75, are no longer applicable.

APPEAL from the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Reversed.*

F. C. Radke, Barlow Nye and *W. A. Crossland,* for appellant.

W. C. Weiss, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

DEAN, J.

The State Bank of Belvidere was taken over by the department of trade and commerce on or about September 21, 1929, and thereafter, namely, on April 12, following, the bank was declared insolvent and a receiver was appointed by the district court for Thayer county to take charge of its affairs. And on July 30 of the same year, the court allowed certain claims of Joe M. Burbach and Joe Wiedel as preferred claims that were entitled to payment from the assets of the failed bank and the depositors' final settlement fund on the same basis as that of claims of depositors and holders of exchange therein. The interveners objected to the classification so made, and, upon trial, the court sustained their contention and decreed that the claims of the interveners should be allowed as trust funds payable in full and prior to the claims of depositors and holders of exchange. The receiver has appealed.

In respect of Burbach's claim, the parties stipulated that he was indebted to the Northwestern Mutual Life

Insurance Company of Milwaukee, and that, on or about September 17, 1929, Burbach purchased a draft for $504.20 from the Belvidere bank, payable to the insurance company. The draft was drawn on the First National Bank of St. Joseph, Missouri, and was paid for by a check in favor of the cashier of the Belvidere bank. In due course the draft was returned to the St. Joseph bank, but payment thereon was refused on the ground that the Belvidere bank was then in the hands of a receiver.

It was also stipulated that Wiedel purchased a draft from the Belvidere bank, on or about September 21, 1929, in the sum of $163, payable to the Securities Investment Corporation of Omaha, and also drawn on the St. Joseph bank, the draft being paid for by Wiedel in cash or its equivalent. In due course this draft was presented to the St. Joseph bank for payment, after the Belvidere bank came into the hands of a receiver, but payment thereon was refused. Subsequently the draft was returned and Wiedel filed his claim against the Belvidere bank.

The parties also stipulated that neither Burbach nor Wiedel was the owner of an account in the Belvidere bank and that the bank was not indebted to either of them except in the amounts of the drafts in question here. And it was also stipulated that, at the time the bank was closed, it had cash on hand and credit with its correspondent banks in a sum greater than the amounts of the drafts.

The receiver contends that the interveners are merely holders of exchange and purchasers of the bank's credit. We agree with counsel. We have held that, in order to create a deposit which will be protected by the guaranty law, it is essential that money or the equivalent of money shall, in intention and in effect, be placed in the bank or at its disposal under circumstances which are in accord with the specific limitations of the bank guaranty law. *State v. Farmers State Bank*, 111 Neb. 117. And we have held that a bank draft, drawn upon another bank

wherein the drawer has sufficient funds to cover it, may be the equivalent of money sufficient to bring the draft within the protection of the depositors' guaranty fund. *State v. First State Bank,* 117 Neb. 370. And while the holder of a bank draft comes within the protection of the depositors' final settlement fund, we do not think the claims of the interveners should be allowed as trust funds payable in full and prior to the claims of depositors and holders of exchange. The amounts of the drafts in question were not set aside for a special or specific purpose and the elements of a trust are entirely lacking.

In some jurisdictions the rule has been stated in this manner: "The purchaser of a bank draft, a cashier's check or a certified check becomes a general creditor of the bank and is not entitled to a preference over other creditors upon the bank's becoming insolvent." *Standard Oil Co. v. Veigel,* 174 Minn. 500. "The purchase of a bank draft creates the relation of debtor and creditor between the bank and the purchaser, and the holder has no preferred claim over other general creditors of the bank." 3 Michie, Banks and Banking (Perm. ed.) sec. 207, p. 316. And in *Leach v. Exchange State Bank,* 203 Ia. 790, the court held: "The purchase of a draft on a drawee which has ample funds of the drawer's is but the purchase of the credit of the drawer. In other words, the purchaser of such a draft voluntarily makes himself one of the *general* creditors of the drawer." To substantially the same effect is *Leach v. Battle Creek Savings Bank,* 202 Ia. 875. And in *Clark v. Bank,* 72 Kan. 1, it was held that, where the bank there failed and passed into the hands of a receiver, after the issuance of a draft upon a correspondent bank in which it had funds on deposit, and where the drawee had notice of such receivership proceedings before the draft was presented for payment, the title passed to the receiver, and that the holder of the draft, in the absence of any special circumstances, was entitled to no priority over other creditors of the failed bank. See, also, *Spiroplos v. Scandinavian-American*

Bank, 116 Wash. 491; *Grammel v. Carmer*, 55 Mich. 201; *Legniti v. Mechanics & Metals Nat. Bank*, 230 N. Y. 415.

We conclude that the interveners, in purchasing the drafts in question, were purchasers of the bank's credit and holders of exchange, and, as such, they are entitled to share *pro rata* with depositors and other holders of exchange in the assets of the failed state bank and in the depositors' final settlement fund, but, in the absence of special circumstances, they are not entitled to have their claims allowed as trust funds. And the former rule, that a bank check or a draft is an assignment *pro tanto* of the fund in the drawee bank, having been changed by statute (Comp. St. 1929, sec. 62-1606), the decisions in *Fonner v. Smith*, 31 Neb. 107, *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803, and *Falls City State Bank v. Wehrli*, 68 Neb. 75, are no longer applicable.

The judgment is

REVERSED.

FRANK W. BERGGREN, APPELLANT, V. CLARENCE G. BLISS, RECEIVER, APPELLEE.

FILED MARCH 18, 1932. No. 28206.

1. **Homestead.** The fact that a husband conveyed to his wife the title to certain land, whereon his family had resided for about 20 years, does not constitute an abandonment of the homestead character with which the land was imbued, and where the wife refused to leave the home and continued to reside there without her husband, the homestead remained undisturbed.
2. ———. "A person cannot at the same time have two homesteads, nor can he have two places either of which at his election he may claim as his homestead." *Hair v. Davenport*, 74 Neb. 117.

APPEAL from the district court for Polk county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

John Tongue, for appellant.

F. C. Radke, Barlow Nye, M. Craft Radke, L. T. Fleetwood and *Stanton & Stanton, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

DEAN, J.

Frank W. Berggren, plaintiff, filed his petition in the district court for Polk county to obtain a $2,000 homestead exemption in a certain tract of land formerly owned by him, but which was sold to satisfy a certain judgment rendered against him and in favor of the receiver of the Farmers State Bank of Stromsburg, December 18, 1929. From a judgment denying his application for such homestead exemption, the plaintiff has appealed.

The record discloses that the plaintiff and his family resided for about 20 years on the southeast quarter of section 26, township 13, range 2, in Polk county. It appears that all of his children are now of age. On October 14, 1929, the plaintiff transferred the record title to the above described land to his wife and, at the same time, he executed two mortgages in favor of his sons. In an action thereon by the receiver, the transfer of the title to the plaintiff's wife was upheld, but the mortgages to the sons were decreed by the court to be of no force and no effect.

From the plaintiff's evidence it appears that, on October 15, 1929, he selected the northwest quarter of section 36, township 13, range 2, in Polk county, which he then owned and which is the land now here in controversy, as his homestead. Some time in April of the following year he moved thereon, but his wife remained on the old farm and refused to go with her husband to the quarter section last above described. From the evidence of the plaintiff it appears that he moved some of his machinery, together with certain miscellaneous articles, to the above described land, where he occupied one or two upstairs rooms in a house also occupied by his son. But the plaintiff appears to have spent much of his time on the quarter section of land occupied by his wife and, in several instances, he was served with summons at his old home. He admits that he told no one of his selection of the new

"homestead." When the land was sold and, later, when the sale thereof was confirmed, the plaintiff had an opportunity to declare his selection of a homestead and to claim exemptions thereto, but he failed to do so.

In *Meisner v. Hill*, 92 Neb. 435, it is said: "Our statute uses the term 'homestead' in its commonly accepted meaning—the house and land where the family dwells." And at an earlier date, this court held that a homestead is a parcel of land on which a family resides, and that such homestead is constituted by the act of selection and the fact of residence thereon. *Galligher v. Smiley*, 28 Neb. 189; *Palmer v. Sawyer*, 74 Neb. 108. And where the title to the family residence is in the wife, it is nevertheless the homestead of the family and is exempt from judgment, but, in such case, the head of the family is not entitled to further exemption of other property. *Stout v. Rapp*, 17 Neb. 462.

As noted above, the quarter section of land occupied by the plaintiff's wife was the family home for many years and it was therefore the family homestead. And the fact that the plaintiff conveyed the title thereto to his wife does not constitute an abandonment of the homestead character with which the land was imbued, and where the wife refused to leave the home and continued to reside there, the homestead remained undisturbed. And, in view of this fact, the plaintiff cannot be said to have acquired another homestead exempt from judgment. It is elementary that "A person cannot at the same time have two homesteads, nor can he have two places either of which at his election he may claim as his homestead." *Hair v. Davenport*, 74 Neb. 117. "Bare intention to occupy such property as a homestead at some future time is not of itself sufficient to impress it with the character of a homestead, while it remains unoccupied; there must be a present intention so to occupy the property as soon as circumstances reasonably permit, evidenced by acts of preparation indicating such intention." *Davis v. Kelly*, 62 Neb. 642. And we have held: "A party cannot be

permitted to defeat the payment of his just debts, by afterwards removing thereon and asserting a claim of homestead." *Bowker v. Collins*, 4 Neb. 494.

We conclude that the plaintiff has not established his right to exemption in the land in question. The judgment is

AFFIRMED.

AGNES WALDEN, APPELLANT, V. ARCHIE WALDEN, APPELLEE.

FILED MARCH 18, 1932. No. 27745.

Marriage. A valid marriage can be contracted in this state only when the parties have previously obtained a license to marry, and when the marriage has been solemnized by a person authorized by law to solemnize marriages.

APPEAL from the district court for Polk county: HARRY D. LANDIS, JUDGE. *Affirmed.*

Thomas & Vail and *John Tongue*, for appellant.

Elmer E. Ross, Donald F. Sampson and *J. H. Grosvenor, contra.*

Cranny & Moore, amici curiæ.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

GOOD, J.

This is a rehearing of the case reported in 121 Neb. 715. The action is for divorce. Defendant denied that there was a valid marriage. The trial court found there was no valid marriage and dismissed the action. Plaintiff has appealed.

The evidence discloses that the parties held themselves out to the public as husband and wife, and that they lived and cohabited together as such for a considerable period, but that there was no solemnization ceremony. The alleged marriage occurred in 1927. Its validity must be determined by the provisions of section 42-104, Comp. St. 1929.

In the case of *Collins v. Hoag & Rollins*, p. 805, *infra*, it is held that this section prohibited a common-law marriage, and that to constitute a valid marriage in this state there must be a license previously issued and the marriage must be solemnized by a person authorized by law to solemnize marriages. It follows that there was no valid marriage between the parties. The judgment of the district court was a correct disposition of the case.

Our former opinion and judgment entered pursuant thereto are hereby vacated, and the judgment of the district court is

AFFIRMED.

PAINE, J., dissents.

ELVIRA COLLINS, APPELLEE, V. HOAG & ROLLINS, INC., APPELLANT.

FILED MARCH 18, 1932. No. 27906.

1. **Marriage.** A valid marriage can be contracted in this state only when the parties have previously obtained a license to marry, and when the marriage has been solemnized by a person authorized by law to solemnize marriages.
2. ———: STATUTE: AMENDMENT: CONSTITUTIONALITY. The amendatory matter contained in chapter 40, Laws 1923, is germane to the sections of the statute amended, and is not broader than its title. Its enactment does not violate that part of section 14, art. III of the Constitution, which reads: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title."
3. ———: ———: ———: ———. Chapter 40, Laws 1923, is not amendatory of either section 42-103, section 42-114, or section 42-115, Comp. St. 1929, and does not violate that provision of section 14, art. III of the Constitution, which reads: "And no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed."

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Reversed and dismissed.*

Dressler & Neely, for appellant.

Cranny & Moore and *O'Sullivan & Southard, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

GOOD, J.

This is a rehearing of the case reported in 121 Neb. 716. Reference is made to that opinion for a statement of the facts.

This case arises under the workmen's compensation law. The vital point herein is the validity of the alleged marriage between the claimant for compensation and the deceased workman. The facts proved were sufficient to constitute a common-law marriage, which the trial court held to be a valid marriage. The alleged marriage occurred in this state in 1929, and its validity depends upon the proper interpretation of section 42-104, Comp. St. 1929, and the constitutionality of that section.

Prior to the enactment of chapter 40, Laws 1923, this court had held on numerous occasions that neither a marriage license nor a solemnization ceremony was necessary to constitute a valid marriage. It had repeatedly held that if a man and woman, each competent to marry the other, agreed to become married, lived and cohabited together as husband and wife, and so held themselves out to the public, such acts constituted a valid marriage. Prior to 1923 there was no statute in this state declaring that to constitute a valid marriage it was necessary for the parties to obtain a marriage license and have their marriage solemnized by a person authorized by law to solemnize marriages. In that year the legislature enacted chapter 40, Laws 1923, which, as amended by chapter 84, Laws 1925, now appears as section 42-104, Comp. St. 1929. In so far as applicable to the present case that section reads: "Previous to the solemnization of any marriage in this state, a license for that purpose must be obtained from the county judge of the county wherein the marriage is to take place, and no marriage hereafter contracted shall be recognized as valid unless such license

has been previously obtained, and unless such marriage is solemnized by a person authorized by law to solemnize marriages."

Counsel for plaintiff contend that, in law, marriage is purely a civil contract, and only the consent of competent parties is essential to creating the marriage relation. Section 42-101, Comp. St. 1929, reads: "In law, marriage is considered a civil contract, to which the consent of the parties capable of contracting is essential." That section does not declare that consent of competent parties is all that is required to constitute a valid marriage. Consent of the contracting parties is only one of the essential elements. This statute forbids the creation of a valid marriage without the consent of the parties. It is universally recognized that the marriage relation is a status, and that the state is interested in and is, in effect, a party to it. *University of Michigan v. McGuckin*, 64 Neb. 300. If it were merely a civil contract, the parties, themselves, might dissolve it by mutual agreement. This the law forbids. The creation of the status entails certain duties and obligations upon the parties thereto; the law imposes upon the husband the duty to support the wife, and, if there be children of the marriage, the obligation of the parents is to support their offspring.

It is also argued by counsel for plaintiff that where the courts and the legislature of a state have recognized common-law marriages as valid no new statute should be held to invalidate such marriages, unless upon clear language in the statute nullifying such marriages. This rule is no doubt sound. The legislature had a purpose in enacting into law section 42-104, Comp. St. 1929. The insertion in that section of the language, "and no marriage hereafter contracted shall be recognized as valid unless such license has been previously obtained, and unless such marriage is solemnized by a person authorized by law to solemnize marriages," was intended to effect a change in the statutory law theretofore in existence, and to meet some need for additional legislation. It is a matter of

common knowledge that for many years the estates of deceased persons have been despoiled by persons claiming to be a common-law spouse of decedent, or an heir-at-law of decedent, born of a common-law marriage. In many cases such claims were in the nature of blackmail. It was no doubt this evil which the legislature sought to correct. The language used seems to us so clear as to leave no room for construction or interpretation. "No marriage hereafter contracted shall be recognized as valid unless" certain things are done is equivalent to saying that marriages not performed in the manner prescribed are void.

It has been suggested that the provisions of the statute above quoted were intended to apply only in cases where a license had been first obtained, and not to apply to common-law marriages where no license had been obtained. The language of the statute will not admit of any such interpretation. What reason could exist for making invalid a marriage where a license had been previously obtained but the marriage not solemnized, and yet leaving valid a marriage that was contracted without license or solemnization? No reason for the distinction is apparent. In our view, the statute was clearly intended to prohibit and make invalid any marriage in this state unless a license was first obtained and the marriage solemnized by a person authorized to solemnize marriages.

Counsel for plaintiff argue that if section 42-104, Comp. St. 1929, was intended to prohibit common-law marriages, then it is unconstitutional and void. They contend that chapter 40, Laws 1923, is broader than its title, and seeks to amend several sections of the statute which are not referred to in the act and which are not thereby repealed, and that this is in contravention of section 14, art. III of the Constitution. The title of said chapter 40 reads: "An act to amend sections 1490 and 1492, Compiled Statutes of Nebraska for 1922, relating to marriage, and to repeal said original sections." Section 1490 provided that at the time of the marriage the male must be of the age of 18 years or upwards, and the female of the age of 16

years or upwards. Section 1492 provided: "Previous to the solemnization of any marriage in this state, a license for that purpose must be obtained from the county judge of the county wherein the marriage is to take place." Chapter 40, Laws 1923, combines these two sections into one, fixes the age limit of parties intending to be married, provides for obtaining consent of the parents or guardian where the parties to the proposed marriage are minors, and further provides for the giving of ten days' notice before the marriage license shall be issued. The two sections, 1490 and 1492, dealt with the regulations necessary to entering into the marriage contract. The same subject-matter is contained in chapter 40, Laws 1923.

It is a rule of law that any amendment may be made to an existing section of the statute if the amendatory matter is germane to the matter contained in the original section. *State v. Majors*, 85 Neb. 375; *State v. Ure*, 91 Neb. 31; *Knothe v. State*, 115 Neb. 119; *In re Estate of Austin*, 116 Neb. 137. We think that the amendatory matter incorporated in chapter 40, Laws 1923, is germane to the sections amended, and that the act does not violate the constitutional provision that "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." Const. art. III, sec. 14.

It is also contended by plaintiff that section 42-104, Comp. St. 1929, is violative of that part of section 14, art. III of the Constitution, which reads: "And no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed," in that the act in chapter 40, Laws 1923, is, in effect, amendatory of three other sections of the statute, now appearing as sections 42-103, 42-114, and 42-115, Comp. St. 1929, without referring to or attempting, in terms, to amend or repeal either of said sections.

Section 42-103, as then and now existing, provides that four certain classes of marriage are void. It will be ob-

served that this statute does not provide that only the classes of marriage therein listed shall be void; nor does section 42-104 change or alter any provision of that section. It remains in full force and unmodified. In fact, the classes of marriage referred to in section 42-103 are void, even though a license has been obtained and the marriage solemnized in the manner provided by law. The legal effect of section 42-103 was to declare that certain persons therein described were incompetent to enter into the marriage relation. Had the legislature so desired, it might have enacted four sections, one for each class of the void marriages, instead of putting four classes into one section. Had it done so, no one would seriously question the power of the legislature to create another, or fifth, class by a separate statute without amending the other sections. However, section 42-104 does not deal with classes of persons incompetent, but with persons competent, to enter into the marriage relation. It is purely a regulatory statute, intended to regulate the manner in which the marriage relation may be created. We think that section 42-104, Comp. St. 1929, is in no sense amendatory of section 42-103.

Section 42-108, Comp. St. 1929, authorizes certain named classes of persons and officials to perform the marriage ceremony, but does not provide that such persons only shall have authority to solemnize marriages or perform marriage ceremonies. Section 42-114, Comp. St. 1929, provides: "No marriage solemnized before any person professing to be a justice of the peace, or a minister of the gospel, shall be deemed or adjudged to be void * * * Provided, the marriage be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage." This section, in effect, authorizes any one to perform a valid marriage ceremony if he purports or holds himself out to be a justice of the peace or minister of the gospel, provided the marriage be consummated with a full belief on the part of either of the parties married that

they have been lawfully joined in marriage. *Haggin v. Haggin,* 35 Neb. 375. In other words, section 42-114, under the conditions prescribed, authorizes persons, other than those mentioned in section 42-108, to solemnize marriages or perform the marriage ceremony. Section 42-115 makes it lawful for any religious society to join together in marriage such persons as are in the society, according to the rites and customs of such society to which they belong, and further provides for a return to be made on the license by the clerk, moderator or person presiding in such society. This section likewise authorizes persons, other than those designated in section 42-108, under the conditions therein prescribed, to perform the marriage ceremony. Section 42-104 does not purport to limit the persons who may solemnize marriages to those designated in section 42-108. We have no doubt that a marriage solemnized pursuant to the provisions of section 42-114 or section 42-115 would be a compliance with the provisions of section 42-104. In our opinion, the latter section is not amendatory of either section 42-103, section 42-114, or section 42-115, Comp. St. 1929.

We therefore conclude that no valid marriage ever existed between Elvira Collins, the claimant, and the deceased workman. Her only right to compensation was on the theory that she was the widow of the deceased workman. It follows that she was not entitled to compensation.

The former opinion of this court and the judgment entered pursuant thereto are hereby vacated. The judgment of the district court is reversed, and plaintiff's action dismissed.

REVERSED AND DISMISSED.

PAINE, J., dissents.

IN RE ESTATE OF JOHN HENRY ZIMMERMANN. ANNA MARY POTHAST ET AL., APPELLANTS, V. RALPH H. ZIMMERMANN, APPELLEE.

FILED MARCH 18, 1932. No. 28153.

Wills: BEQUESTS: CONSTRUCTION. From the will, and the circumstances surrounding the testator at the time it was executed, we construe it as the intention of the testator, where he left a nominal bequest to one class of children and the residue to another class consisting of two, one of whom predeceased him, that this surviving residuary legatee should take the entire residue.

APPEAL from the district court for Clay county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

Chambers & Holland and *C. Russell Mattson,* for appellants.

Lewis & Nuss, contra.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY, DAY and PAINE, JJ.

DAY, J.

This action involves the construction of a will. That part of the will pertinent to the determination is: "Second, I give and bequeath unto my children, Esther, Helen, Annie, Myrtle and the baby, whose name I do not know, the sum of Five Dollars each. Third, I give, bequeath and devise unto my boys Ralph H. Zimmermann and Daniel S. Zimmermann all the rest and residue of my property, of every name, nature and amount, of which I may die seised or possessed, to be theirs absolutely." The boy, Daniel S. Zimmermann, named in the above residuary clause, died in 1918, while the testator died in 1930. The county court held that the bequest of one-half of the residue given to the deceased son Daniel lapsed, and "that said lapsed portion of the estate, being undisposed of by the terms of the will, descends as intestate property." Upon appeal to the district court, the judgment of the county court was reversed, and it was held that the surviving residuary lega-

tee and devisee, Ralph H. Zimmermann, was entitled to the entire residue of said estate.

The will was executed in June, 1909, following the divorce of the parents of the parties herein, in November, 1908. The decree of divorce gave the care, custody, education and support of the children, Esther, Helen, Anna, Myrtle and Maynard exclusively to the mother and the father was enjoined from meddling or interfering with them. By the same decree, the father, the testator here, was given the care, custody, education and support of Ralph and Daniel. Thus, the family was separated into two separate and distinct units by this decree. The father had practically no property at this time and the entire estate represents the accumulation since. The evidence demonstrates that he and the boys, Ralph and Daniel, worked together and each contributed to the estate. There was little, if any, social relations between the two divisions of the family. These are the circumstances surrounding the execution of this will.

It is urged by the appellants that the overwhelming weight of authority supports the view, in the absence of a statute, that, where one of two residuary legatees predeceases the testator, the legacy of such a legatee lapses and becomes intestate estate passing to the heirs or distributees, providing it was bequeathed to the residuary legatees in common, and not as a class, unless the intention of the testator to that effect clearly appears. This is substantially the statement in the annotation in 28 A. L. R. 1237. We refer to the comprehensive citation of cases there, which are too numerous to be cited here. The only exceptions to this rule seem to be the pronouncements of the courts of Kansas and Indiana. *Corbett v. Skaggs,* 111 Kan. 380, *Gray v. Bailey* (1873) 42 Ind. 349, and *Holbrook v. McCleary* (1881) 79 Ind. 167. However, the last two cases cited do not discuss the rule.

The rule is a legacy to American jurisprudence bequeathed to us as a part of the common law of England. The English courts, as far as our investigation informs

us, have never departed from this rule, although it has been criticized. For example, it has been said: "There is a well-known rule that where residue is given to tenants in common, and one of the tenants in common dies in the testator's lifetime, the lapsed share does not go as an accretion to the gift to the other tenants in common, but it is held that there is an intestacy and the share goes amongst the next of kin. That is, there can be no residue of a residue. The arguments by which this rule was arrived at are perfectly intelligible and, one may say, plausible. Nevertheless I think that the effect of it is to defeat the testator's intention in almost every case in which it is applied; but it is a rule by which I am undoubtedly bound." *In re Dunster* (1909) 1 Ch. (Eng.) 103. Likewise, it has also been criticized by some American courts, an example of which is: "The rule thus established does not commend itself to sound reasoning, and is a sacrifice of the settled presumption that a testator does not mean to die intestate as to any portion of his estate, and also of his plain actual intent, shown in the appointment of general residuary legatees, that his next of kin shall not participate in the distribution at all. The rule is in fact a concession to the set policy of English law, nowhere more severely asserted than in chancery, to keep the devolution of property in the regular channels, to the heir and next of kin, whenever it can be done. If this question were new in this state, speaking for myself I should not hesitate to reject the English rule as wrong in principle and subversive to the great canon of construction, carrying out of the intent of the testator." *Gray's Estate,* 147 Pa. St. 67. At a later date the same court referred to the rule in the following language: "The English rule, as we said in *Gray's Estate,* 147 Pa. St. 67, does not commend itself to sound reasoning, or to the preservation of the testator's actual intent, but we found it recognized and accepted in our own cases before these particulars in its application arose, and we felt ourselves bound by it." *Waln's Estate,* 156 Pa. St. 194.

The composite criticism of the rule gathered from many cases, including the ones cited herein, is that the application of the rule usually defeats the intention of the testator. This being a case of first impression in this state, our course is not charted and we are neither handicapped nor assisted (depending upon the reader's personal view) by former decisions. But the choice as to whether we shall follow the unquestioned weight of authority or shall disregard the multiple pronouncement of able and learned courts has been taken from us in the determination of this case by legislative enactment. This is true, because there are special features of the will under consideration which require a decision in favor of the surviving residuary legatee. Section 76-109, Comp. St. 1929, provides: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation of conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest (intent) of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." This statute applies to wills. *Reuter v. Reuter,* 116 Neb. 428, *Krause v. Krause,* 113 Neb. 22, and *In re Estate of Darr,* 114 Neb. 116, are a few of many cases so holding. Many years ago this court stated: "It is a well-established rule of law that, in the construction of a will, the intention of the testator as disclosed by the words used in the instrument, in connection with surrounding circumstances, must be carried into effect." *Lesiur v. Sipherd,* 84 Neb. 296. See *Heywood v. Heywood,* 92 Neb. 72.

It is the unanimous opinion of this court that the intent of the testator can be determined from the will considered in its setting of surrounding circumstances. When this will was executed, the family of this testator had been divided into two separate and distinct integral units by judicial decree. Each unit was to pursue its course in life without dependence on or interference from the other. One division was the father and the two boys mentioned

in the residuary clause of the will. By their joint efforts, this estate of approximately $9,000 was accumulated after the divorce and separation of the testator from his wife. By the provision of $5 each for the children, whose custody was awarded to the mother, the testator evidenced his intention that they should receive so much and no more. This is more apparent from the nominal sum of the bequest than it would have been had the bequest been for a substantial sum. If these bequests had been for a substantial sum it might have been argued with some persuasiveness that the testator did not intend to increase the share of a residuary legatee. However, the unquestioned intention of the testator was to limit the children from which he was separated to a nominal bequest. This intention could not have been more apparent than it is, if he had added the words "and no more" to the end of the sentence providing for the bequests. This view finds support in *In re Ives' Estate*, 182 Mich. 699. In this way he divided his heirs at law into two classes. One class, the children given into the custody of the mother, the other class, the children entrusted into his care. A natural classification for him to make, in view of the circumstances surrounding the testator at the time the will was made. To the latter class he bequeathed all the residue of his estate, after paying legal requirements and the nominal bequests provided to prevent the children of the first class from deriving any substantial benefit from his estate. The residue was intended to go to the children who remained with him. This view of the will, even if we followed the majority rule, would put this case within an exception to the general rule—that the share of a residuary legatee who predeceased the testator lapses. However, it is also indicative of the intention of the testator, which is the objective of our investigation in this case.

Because of the early demise of one, prior to the death of the testator, he took nothing under the will. To hold that one-half of the residue should be divided as intestate property would defeat the expressed intention of the tes-

tator by the will interpreted in the light of the surrounding circumstances. The survivor takes under the residuary clause because it was the obvious intention of the testator, gathered from the four corners of the will. This conclusion is aided somewhat by the presumption that one who makes a will does not intend any of his property to be divided as though he died intestate. *Jones v. Hudson*, 93 Neb. 561. The surviving legatee does not take as a joint tenant. There is no question of joint tenancy involved, since the interest does not vest in a legatee at the time of the making of the will but at the time of the death of the testator. From the will, and the circumstances surrounding the testator at the time it was executed, we construe it as the intention of the testator, where he left a nominal bequest to one class of children and the residue to another class consisting of two, one of whom predeceased him, that the surviving residuary legatee should take the entire residue.

We are of the opinion that, from the will and the conceded facts, our conclusion is justified. It is therefore unnecessary to consider the admissibility of certain evidence, concerning which appellants complain, for that without that evidence the same result should be reached. The judgment of the district court is accordingly

AFFIRMED.

GERTRUDE D. REED, APPELLANT, V. OCCIDENTAL BUILDING & LOAN ASSOCIATION ET AL., APPELLEES.

FILED MARCH 18, 1932. No. 28119.

1. **Judgment**: ASSIGNMENT. An assignment of a judgment given in consideration of "one-third of the original judgment, to be paid me when the judgment is collected, or for one-third of the amount collected, if less than the original judgment is accepted in settlement," and authorizing the assignee to collect said judgment at the risk and expense of said assignee, is an assignment for collection only, and not a sale of the judgment.
2. ———: ACTION: PLEADING. Where it appears upon the face of the petition that a judgment sued on has become dormant,

and has not been revived, the petition fails to state a cause of action, and is subject to general demurrer.

3. Fraud: ACTION: PLEADING. To state a cause of action for fraud or conspiracy to defraud, it is necessary for the pleader to allege not only the conspiracy and the doing of the fraudulent acts, but also facts showing that damage resulted therefrom.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY and LINCOLN FROST, JUDGES. *Affirmed.*

Gertrude D. Reed, pro se.

Ellery H. Westerfield, Claude S. Wilson, Roy F. Gilkeson and *Hymen Rosenberg, contra.*

Heard before ROSE, GOOD and EBERLY, JJ., and CARTER and CHASE, District Judges.

CARTER, District Judge.

This is a case brought in the district court for Lancaster county by the plaintiff, appellant herein, against Trevelyan E. Gillaspie and the Occidental Building & Loan Association, defendants and appellees herein, alleging that on September 18, 1918, the defendant Occidental Building & Loan Association recovered a judgment in the district court for Lancaster county against the defendant Trevelyan E. Gillaspie, in the sum of $1,126.57 with interest at the rate of 10 per cent. per annum from the date of said judgment; that on December 22, 1920, the defendant Occidental Building & Loan Association assigned said judgment in writing to the plaintiff Gertrude D. Reed; that said assignment was placed of record on September 5, 1925, and that the defendant Gillaspie had actual knowledge of said assignment on and after its execution; that after the recording of said assignment, with full knowledge of the same by the defendant Gillaspie, the Occidental Building & Loan Association executed and delivered to said Gillaspie a release of said judgment which was filed with the clerk of the district court for Lancaster county on September 1, 1929.

Plaintiff further alleges that the defendants Gillaspie and the Occidental Building & Loan Association secretly conspired together to release said judgment and to prevent plaintiff from enforcing said judgment against the defendant Gillaspie; that pursuant to said conspiracy the Occidental Building & Loan Association, without the consent or knowledge of the plaintiff, and without paying plaintiff the amount she was entitled to recover by virtue of said assignment, executed and delivered the release of judgment hereinbefore mentioned.

Plaintiff further alleges that said judgment became dormant in September, 1923; that defendant knew that plaintiff was endeavoring to locate property subject to execution belonging to Gillaspie; that she had made preparation to revive said judgment, and that she would enforce said judgment against the defendant Gillaspie. Plaintiff thereupon prayed for judgment for damages against both defendants in the sum of $1,126.57 and interest and costs.

From the judgment of the lower court sustaining a general demurrer and dismissing plaintiff's petition, the plaintiff appeals.

The assignment through which the plaintiff claims a right in the original judgment is as follows: "For one-third of the original judgment, to be paid me when the judgment is collected, or for one-third of the amount collected, if less than the original judgment is accepted in settlement, I hereby assign to Gertrude D. Reed, all rights and interests in and to the judgment recovered in the action, the Occidental Building & Loan Association of Omaha v. Trevelyan Gillaspie, docket 61, page 197, district court for Lancaster county, Nebraska, for $1,126.57.

"And hereby authorize said assignee to collect said judgment with interest and costs from date of judgment.

"All said proceedings to be at the risk and expense of said assignee.

"Dated this 22d day of December, 1920.

"Occidental Bldg. & Loan Ass'n.
"R. A. McEachron, V. P."

It is difficult for the court to determine in this case, whether or not the petition is based upon the judgment hereinbefore mentioned, or whether it is intended as an action for fraud. In either event the court has come to the conclusion that the demurrer to the petition was properly sustained by the trial court.

If the theory of the plaintiff was that it is a suit upon the judgment of September 18, 1918, she cannot recover for the reason that the statute of limitations is a bar to a recovery thereon. Section 20-1515, Comp. St. 1929, is as follows: "If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered in any court of record in this state, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment and all taxable costs in the action in which such judgment was obtained, shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor." It is clearly the law of Nebraska that where it appears upon the face of the petition that the cause of action is barred by the statute of limitations, and there are no allegations tolling the statute, a general demurrer can be properly interposed to such cause of action. *Pohle v. Nelson,* 108 Neb. 220; *Carden v. McGuirk,* 111 Neb. 350. This court has previously held that a domestic judgment is a specialty and barred by the statute of limitations within five years from the date of the judgment, the language of the court being as follows: "There seems to be some inconsistency in providing by statute that an action on a domestic judgment is barred in five years, and that it may nevertheless be revived and enforced at any time within ten years. But this inconsistency is not so great as to provide that there is no limitation, and that an action can be maintained thereon when it has been dormant for a length of time 'whereof the memory of man runneth not to the contrary.' We are, upon further consideration, convinced that the legislature never intended to

remove all limitations of such actions, and that such judgment should be regarded as a specialty within the meaning of section 10 of the code. Rev. St. 1913, sec. 7567." *Armstrong v. Patterson,* 97 Neb. 871. It is the law of Nebraska that the statute of limitations operates against a specialty within five years. "Within five years, an action upon a specialty, or any agreement, contract or promise in writing, or foreign judgment." Comp. St. 1929, sec. 20-205.

It is therefore clear that in the absence of a revivor of the judgment of September 18, 1918, no action could be maintained upon said judgment.

Plaintiff contends that said petition is one sounding in fraud and that she should be permitted to recover on that theory. An examination of the assignment clearly discloses that it was an assignment for collection only and not an absolute sale of the judgment. The assignment itself shows that plaintiff paid nothing for the same, but was to receive only a share of the amount collected. The assignment also specifically authorizes said assignee to collect said judgment with interest and costs at the risk and expense of said assignee. This all implies that said assignment was made in order that plaintiff might make the collection of the judgment for the Occidental Building & Loan Association. Even if the assignment amounted to an absolute sale of the judgment, the plaintiff under the facts disclosed in her petition could not recover. She alleges in her petition that the assignment was on record at the time the release of the judgment was executed by the Occidental Building & Loan Association to the defendant Gillaspie. This being true, the plaintiff could treat the release as of no force and effect and proceed against the original debtor in the same manner as if no release had been made. "Where the judgment has been assigned to a third person, the debtor, after notice of the assignment, must pay to the assignee; but a judgment debtor who learns that the judgment has been assigned acts at his peril in the payment thereof to any party as assignee

without ascertaining the facts." 34 C. J. 685. The plaintiff therefore having all the rights that she formerly had before the execution of the release of judgment has not suffered thereby. It is undoubtedly the law that fraud, or conspiracy to defraud, to be actionable must result in injury to the complaining party. "There is no doubt of the right of a plaintiff to maintain an action against two or more parties for conspiring to do and actually doing some unlawful act to his damage; but the courts, so far as we are aware, are unanimous in holding that confederation and conspiracy are not actionable, unless something in pursuance of the common plan is actually done, and the thing done results in injury to the plaintiff, and the facts constituting this injury, and the damage resulting therefrom, must be alleged." *Commercial Union Assurance Co. v. Shoemaker,* 63 Neb. 173. "And in the next place the party must have been misled to his prejudice or injury; for courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations or correcting unconscientious acts, which are followed by no loss or damage. It has been very justly remarked, that to support an action at law for a misrepresentation there must be a fraud committed by the defendant, and a damage resulting from such fraud to the plaintiff." *Jakway v. Proudfit,* 76 Neb. 62, quoting from 1 Story, Equity Jurisprudence (13th ed.) sec. 203. The plaintiff having failed to plead facts showing that she suffered a damage because of the alleged fraudulent acts of the defendants, the demurrer was properly sustained as to that theory.

The record in this case discloses that demurrers have been sustained to the first petition filed, the amended petition, and to the second amended petition. Under the circumstances, the trial court did not err when he dismissed the case. For the reasons hereinbefore set out, the judgment of the trial court is

AFFIRMED.

JOSEPH L. HARTMAN ET AL., APPELLANTS, V. RUDOLPH LIPOVSKY ET AL., APPELLEES.

FILED MARCH 18, 1932. NO. 28136.

1. **Contracts**: CONSIDERATION: PAROL EVIDENCE. The true facts as to the consideration, or a part thereof, named in a written contract can be varied by parol evidence, when it is merely a recitation of fact and not contractual or promissory in its nature.
2. ———: ———: ———. The acknowledgment of the receipt of consideration, in whole or in part, in a written contract, is a recitation of fact and may be explained or contradicted by parol.
3. **Instructions** examined and found free from prejudicial error.

APPEAL from the district court for Clay county: J. W. JAMES, JUDGE. *Affirmed.*

F. L. Carrico, Bernard McNeny, L. A. Sprague and *J. S. Gilham,* for appellants.

Waring & Waring and *D. B. Massie, contra.*

Heard before ROSE, GOOD and EBERLY, JJ., and CARTER and CHASE, District Judges.

CARTER, District Judge.

This is an action brought by Joseph L. Hartman and Rosalin Hartman, plaintiffs below and appellants herein, against Rudolph Lipovsky and John Lipovsky, defendants and appellees herein, for the sum of $2,600 claimed to be due from the defendants to the plaintiffs on a contract for the sale of real estate. The undisputed facts are that on the 17th day of November, 1927, plaintiffs and defendants entered into a contract whereby plaintiffs sold to the defendants 320 acres of land in Clay county, Nebraska, for "the sum of $38,400, payable as follows, to wit: $4,000 in cash, the receipt whereof is hereby acknowledged; $17,200 on February 1, 1928," and the balance of $17,200 on or before March 1, 1928. The evidence also discloses that at the time of the execution of the contract the defendants paid plaintiffs the sum of $1,400 in cash

and delivered two certificates of deposit to plaintiffs in the amount of $2,600, issued by the Blue Valley State Bank of Spring Ranch, Nebraska; that on the 12th day of March, 1928, said bank closed its doors and was on the 7th day of April, 1928, adjudicated to be insolvent; that said certificates of deposit were never paid except a dividend of 8 per cent. which was subsequently paid by the receiver of the bank.

It is the contention of the defendants that it was orally agreed between defendants and plaintiffs that the certificates should be taken for $2,600 without recourse upon the defendants as part payment of the purchase price, and as a part of the $4,000 cash payment, receipt whereof was acknowledged in the contract. In reply thereto the plaintiffs contended that the defendants orally agreed with the plaintiff, Joseph L. Hartman, that if the bank did not pay the certificates the defendants would guarantee the amounts thereof. The case was submitted to the jury who returned a verdict for the defendants. From the overruling of the motion for a new trial the plaintiffs have appealed to this court.

The principal ground for reversal of this case upon which the plaintiffs rely is that the trial court erred in admitting the parol evidence of the defendants tending to show that plaintiffs accepted the two certificates of deposit amounting to $2,600 as cash.

The evidence of John and Rudolph Lipovsky to the admission of which plaintiffs object was substantially as follows: That a few days prior to the execution of the contract John and Rudolph Lipovsky had a conversation with Joseph L. Hartman to the effect that they would give Hartman $35,000 in cash and $3,400 in certificates of deposit for the land in question; that on the following day Hartman informed him that he did not want to take $3,400 of the certificates of deposit, and that he would not take more than $2,600 of the certificates as that would be enough to lose if he had to lose anything at all; that they went to Fairfield, Nebraska, and caused the contract to be

drawn, at which time Hartman stated that he would not take $3,400 in certificates and that $2,600 was all that he would take on the purchase price; that on the following day they took the contract and went to the Security State Bank of Lawrence, Nebraska, where the contract was executed. The defendants further testified that they never, at any time, agreed to pay these certificates of deposit if they were not paid by the bank, and that Hartman never made demand of them for payment. The only demand that was ever made was made by plaintiff's attorney shortly before the commencement of the action. In addition to the above, Rudolph Lipovsky testified that there was some conversation with the attorney who prepared the contract, and the attorney informed them that he was "putting it in there the way he would put it, and he said, 'he is taking them now on the contract.' "

The plaintiffs contend that the above testimony was admitted in evidence in violation of the parol evidence rule. Plaintiffs' position is that the contract recites that the sale of the land was for the agreed sum of $38,400 and as the evidence shows that only $35,800 has been paid that there is still due the plaintiffs the sum of $2,600 unless the facts pleaded in the answer are established by competent evidence and constitute a legal defense to the action.

The evidence produced by the parties is in direct conflict. If the parol evidence complained of was properly admitted it was plainly a case for the jury to determine which to believe, and their verdict could not be disturbed by this court. If, however, this evidence was erroneously admitted in evidence, the defendants' affirmative defense would fail for want of proof.

As a general rule "A written contract, the meaning of which is certain and patent from its terms, may not be varied by direct explanation or interpretation in oral testimony." *Latenser v. Misner*, 56 Neb. 340. The court is of the opinion, however, that the case at bar does not fall within the above rule. In the case under consideration the words "$4,000 in cash, the receipt whereof is

hereby acknowledged," is a recitation of fact and not a contractual part of the contract. This court has held that the acknowledgment of the receipt of the consideration, or a part thereof, is not a contractual part of an agreement and may be explained or contradicted by parol evidence. In the case of *Wells v. Aufrecht*, 96 Neb. 402, Judge Letton, speaking for the court, says:

"Plaintiff contends that the facts pleaded in the answer are insufficient in law to constitute a defense for two reasons: (1) A written agreement cannot be contradicted by proof of a contemporaneous oral agreement, in the absence of fraud or mistake; (2) a party cannot plead his own fraud as a defense, but only the fraud of the opposing party. These principles, of course, are sound, but the trouble is with their application to the facts in this case. The defendant is not attempting to contradict the written agreement any more than the plaintiff is. Both parties acknowledge that the written contract does not express correctly the real facts. Plaintiff asserts that the sum to be paid is correctly expressed, but that the acknowledgment of the receipt of the sum stated is incorrect; that a receipt is always susceptible to parol explanation, but that the defendant cannot impeach the contract as to the amount.

"The actual consideration which is expressed in a deed may be shown by parol testimony. * * * This rule applies also to the consideration in a contract of sale of real estate, where there is no promise to pay depending upon the statement of the amount, but it is only a recital of an executed fact. The rule that the terms of a written contract cannot be varied by parol evidence is based upon the principle that, where parties have reduced to writing an agreement to do or refrain from doing a certain act, the writing will be taken as the best evidence of the terms of the agreement.

"This principle is not applicable here. As to the payment and receipt of the $1,600, the contract merely recites a present condition. No agreement was made to pay

any part of this sum in the future. A like rule to that permitting proof of the true consideration applies as to the recital that the consideration has been paid. * * * We conclude, therefore, that both the real consideration of the contract and whether it was actually paid may be shown by parol testimony."

The case above quoted is decisive of the point involved in this appeal and sustains the trial court in admitting the parol testimony complained of by plaintiffs.

Plaintiffs complain in their brief that one of the instructions given by the trial court "was one not readily understandable by an ordinary jury." After a careful examination of the instructions given, we find them to be free from prejudicial error, and that the case was fairly and impartially submitted to the jury. The evidence adduced at the trial was sufficient to sustain the verdict.

There being no prejudicial error in the record, the judgment is

AFFIRMED.

JOHN SEVERSON, APPELLEE, V. MARGARET MCKENZIE ET AL., APPELLEES: WILLIAM MCKENZIE ET AL., APPELLANTS.

FILED MARCH 25, 1932. No. 28233.

1. Tenancy in Common: POSSESSION BY COTENANT. The general rule is that the possession of real property by one cotenant is the possession of all.
2. ———: OUSTER: NOTICE. Before ouster of a cotenant arises there must be some notice or knowledge of acts causing such ouster.
3. ———: ———: ———: ADVERSE POSSESSION. The notice or knowledge out of which ouster of a cotenant arises may sometimes be inferred from acts or circumstances attending adverse possession, which are open, notorious and unequivocal in their character and import.
4. ———: ———: ADVERSE POSSESSION. "Where one tenant in common enters upon the whole estate, improves it, takes the profits, pays all the taxes, makes it his home, and claims the whole for more than the period of the statute of limitations, an actual ouster should be presumed, although not otherwise proved." *Lund v. Nelson*, 89 Neb. 449.

5. Quieting Title: LACHES. "Independently of any limitation for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked." *Abraham v. Ordway*, 158 U. S. 416.
6. ———: ———. "Courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute of limitations." *Hawley v. Von Lanken*, 75 Neb. 597.

APPEAL from the district court for Cuming county: DE WITT C. CHASE, JUDGE. *Affirmed.*

A. R. Oleson, for appellants.

Zacek & Nicholson, contra.

Heard before GOSS, C. J., DEAN, GOOD, DAY and PAINE, JJ., and LANDIS and RAPER, District Judges.

GOSS, C. J.

This is a suit to quiet title to two town lots in Wisner, bought by John Severson on January 8, 1929, through partition proceedings. From a decree for plaintiff, Helen M. Oleson and other cross-petitioners appealed. There is little dispute over the important facts. Many of them are stipulated. The partition proceedings were brought by the heirs of James C. McKenzie of Wisner, who had been in actual possession of the lots for many years prior to his death, intestate, on May 13, 1928. His estate, probated in Cuming county, was closed November 20, 1928, and his heirs brought the partition suit January 8, 1929.

James C. McKenzie, Kenneth J. McKenzie and Donald McKenzie were brothers. James lived at Wisner, Nebraska, Kenneth lived at Onawa, Iowa, and Donald lived in Canada. In 1894, while on a visit with his brother James, Kenneth J. McKenzie acquired the property in controversy. Kenneth J. McKenzie died testate on March 18, 1896. On May 19, 1896, his will was admitted to probate in Iowa. On July 14, 1896, an authenticated copy was filed for probate in the county court of Cuming county,

Nebraska, for ancillary administration here, and was subsequently duly admitted to probate. On August 7, 1896, letters testamentary were issued to James C. McKenzie, as executor; no further proceedings were had in said estate after that date. By said will of Kenneth J. McKenzie the property in controversy was devised to James C. McKenzie and Donald McKenzie. It does not appear that the estate owed any debts. It would seem that the purpose of probating the will here was to show its devise of the Cuming county property, being the two Wisner lots.

After the death of Kenneth J. McKenzie and in 1896 or 1897, James C. McKenzie moved a barn upon the lots, fenced them in and continued to use them as a barnyard until his death. He put sidewalks in front of the property, paid all taxes on the lots from 1897 to his death, including $230 paving assessments, was in exclusive possession, and was reputed to be the sole owner. Neither Donald McKenzie nor any one claiming under him had ever made any claim to the property, and James C. McKenzie was testified to have stated that he was the owner.

All of the appellants except Helen M. Oleson claim an undivided one-half interest in the lots as heirs of Donald McKenzie, who died in Canada, August 2, 1897. Helen M. Oleson claims the like interest under a deed from the administrator with the will annexed of the estate of Donald McKenzie. All appellants admit that plaintiff is entitled to an undivided one-half interest in the lots but no more. The Donald McKenzie will was admitted to probate in Cuming county on October 13, 1930, by use of an authenticated copy from the Monona, Iowa, probate proceedings. It may be said generally, as to the terms of the will and for the purposes of this suit, that, if given effect here, the will served as a basis for the assertion of the interests set up by appellants.

The district court expressly held that plaintiff and his predecessors had title by adverse possession, with all of the elements operative in relation thereto, since 1896 or

1897. Appellants challenge that holding on the particular ground that, when James C. McKenzie took possession of the lots, he did so for himself and, as executor, for his brother Donald, both of whom took the real estate under the will of Kenneth, as cotenants. They rely on the general proposition so well stated in *Walter v. Walter,* 117 Neb. 671, that possession by a cotenant is presumed to be friendly and, to become adverse, requires notice that the entire estate is claimed in hostility to cotenants. Plaintiff, on the other hand, claims there was no occasion for James C. McKenzie, as executor, to take possession of these unimproved lots, as there were no rents and profits to collect and no estate debts to pay. Title vested in James C. and Donald, as devisees under the will, subject to claims against the estate. The executor was not required to take actual possession in the circumstances and unless ordered by the court. *Tunnicliff v. Fox,* 68 Neb. 811; *Lewon v. Heath,* 53 Neb. 707. We conclude from all the circumstances that, when James C. McKenzie took possession of the lots, he did so in his own right as a devisee under his brother's will and not as executor.

The general rule is that the possession of one cotenant is the possession of all. So James C. McKenzie's possession was also that of Donald McKenzie, the other devisee, unless and until there was an ouster of the latter. Such ouster may arise from open, notorious and hostile possession under claim of ownership for the statutory period. 1 R. C. L. 742, sec. 62. It is a general rule that, before ouster of a cotenant arises, there must be notice or knowledge, but these "may be inferred from acts or circumstances attending such adverse possession, which are overt, notorious and unequivocal in their character and import. From such acts it is the duty of the other cotenants to be informed thereof and to draw such reasonable inferences therefrom as prudent persons possessed of and interested in like information would naturally do, and such cotenants out of possession cannot prevent the operation of the statute of limitations by proving that they did

not know of the facts affecting their interest, or, knowing of them, did not draw correct conclusions therefrom." 7 R. C. L., 851, sec. 45.

So an ouster of a cotenant out of possession by a cotenant in possession sometimes may, in proper circumstances, be presumed from long and continued and undisturbed possession.

This rule was applied by this court in *Lund v. Nelson*, 89 Neb. 449, the syllabus of which case is as follows: "Where one tenant in common enters upon the whole estate, improves it, takes the profits, pays all the taxes, makes it his home, and claims the whole for more than the period of the statute of limitations, an actual ouster should be presumed, although not otherwise proved."

In *Walter v. Walter*, 117 Neb. 671, this *Lund* case was criticized because of making too general a statement of the rule, although the rule was approved in its application to the facts of the *Lund* case. It is true the decision in the *Walter* case was against a cotenant claiming title by adverse possession. But there was little there in common with the facts here to give notice of a hostile claim on the part of those in possession. As the opinion says: "We find nothing in the character of this possession calculated to give notice of a hostile claim by plaintiffs. The fence existed before the death of Joseph, Sr., and the digging of ditches was not an act of such notoriety as to furnish such notice. It was only such an act as would be done by an ordinary tenant seeking to make profitable use of the land. Moreover, they were dug within the ten year period."

Here James C. McKenzie took possession of two lots of little intrinsic value. (Plaintiff paid $865 for the entire title at referee's sale. Helen M. Oleson's deed called for $500 for an undivided half interest.) He moved a barn and placed it on the lots. He stated that he owned them. He fenced the lots and for more than 30 years exercised openly all the rights of ownership. He paid hundreds of dollars of taxes on the property. This situation distin-

guishes the case at bar from the *Walter* case, and the facts as to the possession here constituted such notice of hostile possession as to do away with any presumption that the possession of James C. McKenzie was for the benefit of his cotenant. If these acts were such as would put a man of ordinary prudence upon guard or inquiry, they are sufficient under the discussion in the *Walter* case, which said: "This notice need not be direct and positive, but may be inferred from acts of the tenant in possession, in hostility to the title of his cotenants, of such an open and notorious character as would put a man of ordinary prudence upon his guard. Acts of the tenant, however notorious, which are reasonably consistent with the existence of title in his cotenants are not sufficient, they must be hostile and of such a character as would put a reasonable man, aware of his rights, upon inquiry."

We call attention to another rule which we think may well be invoked. "Courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute of limitations." *Hawley v. Von Lanken*, 75 Neb. 597. This followed the opinion of the supreme court, by Mr. Justice Harlan, in *Abraham v. Ordway*, 158 U. S. 416, in which he said: "Independently of any limitation for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked."

Here appellants waited more than 20 years after the expiration of an ordinary time of limitation. They knew or should have been aware that for nearly a generation there had been no action in the proceedings to complete the probate of the will under which they claim, had been no income from the property devised, and no report concerning it. Altogether we are satisfied that the district court made the right disposition of the controversy by its decree for plaintiff. The judgment is

AFFIRMED.

GEORGE L. MCCARTER V. J. D. COVER, APPELLEE: JOHN J. MCCARTER, APPELLANT.

FILED MARCH 25, 1932. No. 28178.

Appeal: FINDINGS BY COURT. "The findings of the trial judge in an action at law tried by the court without the intervention of a jury are entitled to the same weight as the verdict of a jury, and, if supported by sufficient competent evidence, will not be disturbed by this court." *Manville v. Park*, 108 Neb. 285.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

York & York, for appellant.

Nye & Nye, contra.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and PAINE, JJ.

DEAN, J.

This action was begun by George L. McCarter, in the district court for Buffalo county, against J. D. Cover to recover the value of a truck and also certain rent of a bakery. Both the truck and the bakery were received as part payment by the plaintiff in the sale by him to the defendant of a certain lot in Lexington. The defendant filed a cross-petition against the plaintiff and John J. McCarter wherein the defendant alleged a breach of warranty in the deed to the lot in Lexington above named. Judgment was entered in favor of Cover on his cross-petition and against John J. McCarter for $400 with interest at the rate of 7 per cent. per annum from November 2, 1929, as damages for the alleged breach of the covenants of the deed in question. McCarter has appealed.

As grounds for reversal, McCarter contends that the cross-petition fails to state a cause of action and that the measure of damages is incorrect and that the judgment is not supported by sufficient evidence. Upon an examination of the above assignments of alleged error, however, we think they are without substantial merit.

The evidence discloses that a house and certain other buildings on the lot adjoining the one in Lexington that was sold to Cover encroach upon the Cover property and that such encroachment was known and admitted by the parties herein when the sale was negotiated. It is Cover's contention, however, that McCarter represented to him that the buildings on the adjoining lot encroached only a few inches and that McCarter agreed to remove such encroachments. But, after the deed was executed, the city engineer of Lexington was employed by Cover to make a survey of the lots and, from his evidence, it appears that a chicken house on the adjoining lot extends three feet over the boundary, and that a coal house extends three feet on one side and six feet and three inches on the other side, and that a dwelling-house extends one foot and four inches on the north side and two feet and two and one-half inches over the boundary of the Cover property on the south side. Cover thereafter demanded that the encroachments be removed, but McCarter failed to comply therewith.

We cannot, of course, lose sight of the elementary proposition that "The findings of the trial judge in an action at law tried by the court without the intervention of a jury are entitled to the same weight as the verdict of a jury, and, if supported by sufficient competent evidence, will not be disturbed by this court." *Manville v. Park*, 108 Neb. 285.

We conclude that the judgment is supported by the evidence. Nor does reversible error appear herein. The judgment is

AFFIRMED.

FEDERAL LAND BANK OF OMAHA, APPELLEE, V. PETER P. RADKE: TRACY T. FROST, APPELLANT.

FILED MARCH 25, 1932. No. 28238.

1. **Mortgages**: FORECLOSURE: SALE: CONFIRMATION. "There are no restrictions upon the means by which the trial court may satisfy itself that a fair price was obtained at a foreclosure

sale or that a subsequent sale would not realize a greater amount." *Occidental Building & Loan Ass'n v. Beal, ante*, p. 40.

2. ———: ———: ———: SETTING ASIDE. "A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake." *First Nat. Bank v. Hunt*, 101 Neb. 743.

APPEAL from the district court for Howard county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Charles Dobry, for appellant.

E. F. Dougherty, J. M. Gurnett and *H. M. Johnsen, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

DAY, J.

This is an appeal from an order of confirmation in a foreclosure proceeding. The record discloses that a decree of foreclosure was rendered on January 11, 1930, whereupon defendant took a nine months' stay. Sale was held on November 17, 1930, at which sale plaintiff purchased the property for $3,723.88. Defendant filed objections to confirmation on November 24, 1930, and upon hearing the sale was set aside. A second sale was held on June 2, 1931, and plaintiff again purchased the land in question for the amount of its indebtedness, which was now $3,896.87. Objections to confirmation were again filed by defendant upon the same grounds as those relied upon in the first sale, namely, that the said real estate was reasonably of the value of $6,000. The same trial judge who had set aside the first sale refused, on September 7, 1931, to disturb the second, holding that "the property sold for its fair cash market value under the circumstances and conditions of said sale and that a subsequent sale would not realize a greater amount." It will be noted that defendant has made no payment to plaintiff either of taxes, or of the semiannual amortization instalments and interest due upon the loan, and has been in possession after default, since January 11, 1930.

Defendant relies for reversal upon the following assignments of error: (1) The court erred in admitting the testimony of A. W. Reinss; and (2) the land did not sell for its fair value under the circumstances and conditions of the sale. These will be discussed in order. Plaintiff introduced but one witness, one A. W. Reinss, who testified that he had been over the land in question, that he owned land in the vicinity, that little land had been sold anywhere in the vicinity, and, over defendant's objection that a proper foundation had not been laid, stated that in his opinion the fair value of the land was not more than $25 an acre. This court has held that "There are no restrictions upon the means by which the trial court may satisfy itself that a fair price was obtained at a foreclosure sale or that a subsequent sale would not realize a greater amount." *Occidental Building & Loan Ass'n v. Beal, ante,* p. 40. See, also, *Lindberg v. Tolle,* 121 Neb. 25. Undoubtedly, in the instant case, the court considered the fact that there had been a previous sale, at which time the plaintiff had been forced to bid in the property at approximately the same price, that these proceedings had been pending for almost two years, during which time defendant had not been able to dispose of the land to some one who would assume the burden of the mortgage, and that the market for real estate had been slow and in decline since the time of the first sale of the property in dispute. There is no merit in defendant's first assignment of error.

Defendant relies upon the inadequacy of price, alleging that the land did not sell for its fair value. This court has repeatedly held: "A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake." *First Nat. Bank v. Hunt,* 101 Neb. 743. See, also, *Lemere v. White, ante,* p. 676; *Metropolitan Life Ins. Co. v. Heany, ante,* p. 747; *Vought v. Foxworthy,* 38 Neb. 790; *Kearney Land & Investment Co. v. Aspinwall,* 45 Neb. 601; *Iowa*

Loan & Trust Co. v. Stimpson, 53 Neb. 536; *Green v. Paul*, 60 Neb. 7; *Jones v. Cleary*, 2 Neb. (Unof.) 541. Defendant offered the *ex parte* affidavits of a number of persons to the effect that the fair value of said land was a sum ranging from $40 to $50 an acre, and that on a resale of said property it would bring that price. No evidence is adduced as to who or what parties were ready, willing and able to make this offer, that one had been made, or would be made, or that any fraud or mistake appeared. The property in question here had been offered for sale twice, within a period of two years, bringing approximately the same price each time. The trial court did not err in refusing to set aside the second sale, and the judgment is affirmed, with leave to redeem before the mandate is issued.

AFFIRMED.

BARBARA SWOLEC, APPELLANT, V. SYLVESTER SWOLEC, APPELLEE.

FILED MARCH 25, 1932. No. 28145.

1. **Divorce**: CUSTODY OF CHILDREN. In awarding the custody of minor children, the court looks only to the best interests of such children, and those of tender age are usually awarded to the mother. Other considerations being equal, it is usual to award the custody of children to the innocent spouse.
2. ———: ALIMONY. Permanent alimony is founded upon the right of the wife to such support from her husband as she would be reasonably entitled to expect, considering all of the circumstances. Its amount rests upon the sound discretion of the court. Comp. St. 1929, sec. 42-318.
3. ———: ———. In awarding such alimony, the financial holdings must first be considered, their value as of the time of the decree, the manner in which such property was acquired, the amounts contributed by each, its income and productiveness, as well as the respective earning capacity of each party.
4. ———: ———. In fixing the amount of permanent alimony, all evidence must be considered relating to the ages of the parties, duration of and conduct during marriage, the station in life, circumstances and necessities of each, as well as their health and physical condition.

5. ———: ———. The policy of the law being to give to an injured wife, not merely what necessity but what justice demands, various decisions, in which alimony has been fixed at from 15 per cent. to 50 per cent. of the husband's property, examined and discussed. Consideration must also be given as to whether other relatives of the husband have legal claims upon him for support.

APPEAL from the district court for Nance county: FREDERICK L. SPEAR, JUDGE. *Affirmed as modified.*

G. N. Anderson and *Wagner & Wagner*, for appellant.

Kemp & Brower, contra.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY, DAY and PAINE, JJ.

PAINE, J.

The appellant wife filed her petition in the district court for Nance county, asking for a divorce, custody of the two children, alimony and suit money. The husband filed a cross-petition, asking for a divorce and the custody of the two boys. The court granted the wife a divorce and the custody of the two children until September, 1931, when the decree directed that the two sons be put in school in the St. Anthony's school at Cedar Rapids, Nebraska, for the school year beginning September, 1931. The court allowed the plaintiff $2,831 permanent alimony, which amount was fixed by allowing her $1,100, which she had put into the farm property from money she had received from her parents, and $1,731, being one-third of the estimated value of the accumulated property. The wife appealed from the order of the district court.

The parties are of Polish descent, and were married October 25, 1913, and at the time of their marriage the appellee's father deeded the appellee 160 acres of land, giving him one eighty outright and selling him the other eighty for $8,000, and, as a result of their joint efforts on the farm, they have paid the $8,000 for said farm, lying 13 miles east of Fullerton, and equipped it with machinery and live stock and buildings.

The husband used intoxicating liquor frequently, and the appellant claims that all of their troubles arose from his drinking. They have separated on several prior occasions, but relatives brought them together. When they separated the last time, the appellant went to Omaha and stayed three months and learned how to operate a beauty parlor, leaving the two boys, Alvin, aged 13 years, and Leonard, aged 7 years, with her parents. Upon her return she opened a beauty parlor in Fullerton with her sister, and now conducts the same.

The wife claims that whenever a quarrel would occur between the parties the husband would assault her, but there is evidence to indicate that the appellant on some occasions was able to hold up her end in such affairs, and upon several occasions neighbors came in and tried to assist in settling the difficulties. The parties are members of the Roman Catholic church, and it is charged that the mother alienated the children from their father. The district judge directed that the boys should remain away from both parents for one year, and attend the St. Anthony's Catholic school at Cedar Rapids, Nebraska, and provided that the custody of the children be delegated during said time to the authorities conducting said school, the expenses of such schooling to be paid by the father; that, after they had finished the year's schooling, the district judge would hold a hearing and enter an order as to their permanent custody. The mother, by filing a bond and appealing to this court, has thwarted this order of the district court and has kept them with her, and has sent them to the public schools in Fullerton, and in addition they have attended a catechism class conducted at the Catholic church in Fullerton each Saturday.

The wife was 17 years of age at the time she was married, and her husband was 27 years of age. She is careful of her expenditures, and no complaint is made against her moral character. However, the evidence discloses that she lacked much in self-control.

In awarding the custody of minor children, the court

looks only to the best interests of such children, and children of tender age are usually awarded the mother. *Nathan v. Nathan*, 102 Neb. 59; *Boxa v. Boxa*, 92 Neb. 78; *Feather v. Feather*, 112 Neb. 315. Other considerations being equal, it is usual to award the custody of children to the innocent spouse.

It is to be regretted that this hard-working father, running the farm of 160 acres, has neither the time nor a suitable place in which to bring up his two boys. Neither is the mother able to devote the time she should to their care when she is devoting many hours a day to running a beauty parlor, often leaving the boys on the streets after school hours; but at the present time it appears to this court that it is the lesser of two evils to permit the mother to retain the custody of these two boys until an order for their permanent care is made by the district court.

The regular attendance at school of boys of this age is of the utmost importance, and as this appeal has defeated the order of the district court that these boys attend a certain school during this entire school year, it is ordered that the judgment of the district court in that regard be set aside, and the custody of the boys is granted to the mother until June 3, 1932. The father is directed to pay to the mother the sum of $20 a month from August 4, 1931, up to June 3, 1932, for their support and care, and the father is allowed their custody for two hours each Saturday afternoon during said time.

Under the circumstances, the order entered by the district judge is hereby modified, and the district judge will hold a further hearing and make an order for the permanent custody of these two sons.

It was insisted before this court that the amount of the alimony granted to the wife lacked much of being sufficient under all the circumstances. The district judge, in determining the amount of the alimony, may have omitted from his calculations the 80 acres of land given to the appellee by his father, and considered only the 80 acres of land for which $8,000 had been paid by their joint

efforts, and from this he deducted the $1,100 that the parents of the wife gave her at the time of their marriage. The court found that the value of the entire property accumulated by their joint efforts amounted to $6,293, and deducting from this the $1,100, he awarded the wife $1,731, or one-third of the balance, making a total amount to be paid to her in cash of $2,831.

Permanent alimony is founded upon the right of the wife to such support from her husband as she would be reasonably entitled to expect, considering all of the circumstances of the parties, and this obligation continues after their legal separation. Permanent alimony was unknown at common law, and in this state is based upon section 42-318, Comp. St. 1929, which declares that the court may award "such alimony out of his estate as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case." It will be seen at once that, under such a liberal statute, the fixing of the amount of the alimony rests alone upon the sound discretion of the court. The first factor that should be taken into consideration is the financial circumstances of the parties, and all of the property owned by the parties should be considered and its value ascertained as of the time of the decree. Next, the income and productiveness of the property should be considered, together with the earning capacity and future prospects of the parties; the manner in which such property was acquired, whether through joint savings or by inheritance, and the contributions made by each, together with the value of the services rendered by each of the parties during their marriage. If evidence relating to the respective ages of the parties, the duration of and conduct during the marriage, their station in life, respective wants, circumstances and necessities, has been given, it should be considered, together with the health and physical condition of the parties, especially if the wife's health has been affected by the habits or conduct of the husband, also, as to whether

other relatives of the husband have legal claims for support.

With these guiding principles in mind, let us examine a few of our Nebraska cases to see how they were applied. In cases appealed to this court, the alimony has been increased in some and cut down in others, yet not according to any ascertainable standards.

As to the amount of the alimony, it has varied greatly, for in *De Vore v. De Vore,* 104 Neb. 702, *Heist v. Heist,* 48 Neb. 794, and *Pierce v. Pierce,* 96 Neb. 511, the amount awarded to the wife was approximately one-half of the value of the property.

On the other hand, in *Cochran v. Cochran,* 42 Neb. 612, and *Smith v. Smith,* 19 Neb. 706, the alimony was but one-fourth of the value of the property.

In many cases, too numerous to cite, it has been fixed at one-third of the value of the property. This was done in *Goldenstein v. Goldenstein,* 110 Neb. 788, which involved property of $25,000, and in the case of *Nathan v. Nathan,* 102 Neb. 59, where the husband admitted that his holdings were worth $155,000, an award by the district court of $35,000 was increased in this court to $50,000. In the case of *Edholm v. Edholm,* 99 Neb. 331, an award of only $25,000 was allowed on a valuation of $110,000, while in *Kimbro v. Kimbro,* 73 Neb. 171, an award of $5,500 was cut in this court to $2,500 out of property valued at $16,700. In *Haase v. Haase,* 118 Neb. 94, an award of $1,000, out of property worth more than $16,000, was raised to $3,000 by this court. In *Tiernan v. Tiernan,* 112 Neb. 707, an award of $125 a month to the wife was set aside in this court, and she was given $40,000, payable in five annual instalments of $8,000 each, when the husband's estate amounted to over $250,000.

It must be clear, from these few illustrations, that there has never been an attempt by this court to fix any rules which would relieve the trial judge of a patient, detailed study of every fact and circumstance relating to each case as it comes on for trial.

With the above observations in mind, let us examine the record in the case at bar. The estimates as to the value of this farm land, aside from those of the litigants, ran from $62.50 an acre to $125 an acre, and the fair average of these estimates of witnesses fixed the value of the land at $88 an acre for the entire 160 acres. The debts outstanding against the property amounted at the time of the trial to $3,327, exclusive of the $1,100 contributed by the wife. Under these circumstances, this court sets aside the order for the payment of $1,731 alimony to the wife, and increases the permanent alimony to $2,500, which, with the $1,100 contributed by her, makes a total of $3,600, which shall be a lien against the property of the appellee, which amount, considering the present depression in the values of farm products and the difficulty of securing mortgages upon farms, shall be paid to the appellant at the rate of $400 each year for nine years, in payments of $200 upon June 1 and $200 upon December 1 each year, and said payments are to bear no interest if paid when due.

It is further ordered that the appellee shall pay, in addition to the costs in both courts and the attorney's fee of $250 allowed by the district court, an additional $150 for attorney's fee in this court, and that the district court, at the time of determining the permanent custody of the sons, shall make such order for their support as may be just and equitable under all the circumstances.

Judgment of the district court modified as herein set out, and affirmed as modified.

AFFIRMED AS MODIFIED.

LOUISE THOMPSON, APPELLANT, V. YOUNG MEN'S CHRISTIAN ASSOCIATION OF OMAHA, APPELLEE.

FILED MARCH 25, 1932. No. 28061.

1. **Negligence: CARE REQUIRED OF OWNER OF BUILDING.** The owner of a building is not an insurer against accidents to an invitee who is leaving by steps provided for that purpose; but the

owner is bound to exercise reasonable care and prudence to keep those steps reasonably safe for the use of such invitee.

2. ———: PRESUMPTION. The fact that an invitee falls upon the steps leading from the exit of a building to the sidewalk below does not raise any presumption of negligence on the part of its owner, and the doctrine of *res ipsa loquitur* does not apply.
3. ———: PROOF. Facts constituting negligence must be proved and not left to inference.
4. ———: BURDEN OF PROOF. Where a recovery is sought for personal injury sustained by an invitee in falling upon the steps of a building, on the ground that the owner of that building was negligent in permitting water to accumulate on one of those steps, the burden is upon the plaintiff to prove that said condition existed and was known to the owner before the accident, or that it had existed for so long a time theretofore as to charge the owner with notice and to have afforded him a reasonable opportunity to remove it.
5. ———: ASSUMPTION OF DANGERS. A person lawfully on the premises of another assumes the dangers which are open and obvious and which can be seen readily and avoided by the exercise of ordinary care.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Crofoot, Fraser, Connolly & Stryker, for appellant.

Brown, Fitch & West, contra.

Heard before ROSE, GOOD and DAY, JJ., and FROST and MESSMORE, District Judges.

FROST, District Judge.

This is a suit to recover for personal injuries suffered by Louise Thompson, plaintiff and appellant, who is hereinafter referred to as patron or invitee. In her petition she alleges that the Young Men's Christian Association of Omaha, Nebraska, defendant and appellee, hereinafter referred to as association, maintains steps leading to the entrance of its building from the sidewalk, and that these steps, by constant use, have become worn, recessed and uneven in surface, by reason of which they have become unsafe and dangerous. She also alleges that they were unsafe on the day of the accident because water had been

spilled upon one of them. On the other hand, the association contends that the steps were in an ordinary and usual safe condition, and that if one of them was wet at the time of the accident the association had no knowledge thereof and was not responsible for that condition and had no opportunity to learn of it before the accident. At the conclusion of the evidence the trial court sustained the association's motion to discharge the jury and dismiss the patron's cause of action. A motion for a new trial was filed and overruled and the case is brought to this court.

The complaint is that the court erred in finding that there was not sufficient evidence of negligence on the part of the association to require a submission of the case to the jury.

The patron in her brief says that undoubtedly the accident "happened on account of the condition of this step, combined with the fact that water had been spilled thereon." The negligence of the association depends upon whether the steps had become so worn that their use was not reasonably safe, and whether the water which she claims had been spilled thereon had made them unsafe for use, and that this condition was known to the association or by the exercise of reasonable diligence should have been known to it. There is still another question to be met in disposing of this appeal: Was the patron's knowledge of the condition of these steps such that she assumed any risk that might be involved in their use?

These steps are limestone and have been in use twenty-five years. They have in that time been worn by the heavy travel over them. We are fortunate in having the result of this use shown in exhibit 1, attached to the bill of exceptions. This exhibit does not leave the wear shown by the steps, and particularly the first step, which was the one on which the accident happened, to conjecture, but gives the exact amount of wear upon the face of the tread. The tread is 11½ inches wide and there is some wear thereon at the center back 9½ inches. The wear

extends along the front 2 feet on either side of the center, where it is 1 inch, while on the two sides, 6 inches away, it is 1¾ inches, and at 1 foot away five-eighths of an inch and seven-sixteenths of an inch. In the center, back 6 inches, the wear is nine-sixteenths of an inch, while 6 inches on the two sides it is three-fourths of an inch and seven-sixteenths of an inch. Other figures showing the exact wear at different points on the face of the tread are given in the exhibit, and, generally speaking, the wear becomes less as the distance from the front center becomes greater, until the depression becomes nothing at 9½ inches back and at 2 feet on either side. Exhibit 1 gives the facts which present to the mind a perfect picture of the depression at any point in the face of the tread. There is nothing in the evidence which indicates that the wear has not been fairly uniform or that any particular holes have been made by that wear. The trial court evidently took the view that there was nothing in the wear of this step or of all the steps which indicated that it was negligence for the association to allow their continued use.

The patron says in her testimony that there were a few drops of water just outside the entrance door, and that as she started to step down to the first step she saw a small amount of water upon that step. She further says that, when her foot slipped under her, she sat down on the step and then could see no water, and that later she found her dress that had absorbed the water on the step was wet a distance of six to nine inches across. A few minutes after the accident the business manager of the association went out to observe the place where the accident happened and he testifies at that time he could see no evidence of any water. The patron testified that when she went in the building on the day of the accident she approached over these same steps, and at the time a boy was washing the door windows on one side of the entrance, and when she came back out five minutes later he was just crossing to wash the windows on the other

side and was carrying a pail of water, the inference being that he had spilled the water. The business manager testified that a company was employed to do this work and he knew nothing of anybody being there to wash windows on the morning of the accident.

The law applicable to this case is well settled and most of the legal propositions involved are outlined in the case of *Broadston v. Beddeo Clothing Co.*, 104 Neb. 604. This law puts upon the association the duty to use reasonable care and prudence to keep the steps by which approach is made to the entrance of the building reasonably safe for their use by those having business inside. The association would limit its duty by adding that it is not an insurer against accidents and the *Broadston* case justifies such limitation. The patron claims that she fell on the steps, not only because they were defective from wear, but also because they were wet and slippery. To establish her claim in this latter regard, according to another legal principle announced in the *Broadston* case, she must prove, unless the evidence shows the condition existed and was known to the association, either that the latter had caused the condition or that it had existed a long enough time prior to the accident to charge its servants with notice to afford them a reasonable opportunity to remedy it. The patron's own testimony shows that the window washing was going on as she was entering and during the five minutes that she was inside the building, and that she saw, as she was leaving the building, the drops of water on the sill and at one spot in a depression in the first step. According to the manager of the association the work was being done under contract and the one doing it was not under the control of the association. Therefore, the trial court was justified in concluding that if there was any water on the step the association could not be blamed therefor, because the window washing was done by the servant of another, and because of the very short time between the washing and the accident. In other words, the association had no knowledge

of the water being there, had not itself caused it to be there, and the time that it had been there was too short to charge the association with notice and to afford it a reasonable opportunity to remedy that condition. *Broadston v. Beddeo Clothing Co.*, 104 Neb. 604; *Schnatterer v. Bamberger & Co.*, 81 N. J. Law, 558, 34 L. R. A. n. s. 1077; *Chick v. Gilchrist Co.*, 208 Mass. 183.

The patron's contention is that the condition of the steps was in itself evidence of negligence which required that question to be submitted to the jury. Ordinarily, where oral testimony is depended upon in order to show wear that might be true. The different descriptions of the conditions of the steps then would necessarily vary and there probably would be questions upon which the jury must pass. However, in this case exhibit 1 was prepared by the patron's witness, a civil engineer, and was received in evidence without objection. This exhibit supplies the facts from which we must draw the conclusions as to the condition of the steps. We think the trial court was right in holding that their condition was not such as to make their continued use evidence of negligence. This position finds confirmation in the *Broadston* case, which holds that a customer falling upon a stairway does not necessarily raise a presumption of negligence on the part of the proprietor of the store, and the doctrine of *res ipsa loquitur* does not apply.

In the case of *Garland v. Furst Store*, 93 N. J. Law, 127, it was charged that the defendant maintained a slippery tile floor in the basement which was dangerous for persons to walk upon. The court in the opinion makes use of this significant language: "A mere fall of a person on the premises of another, without any evidence to show how the fall was occasioned, raises no presumption of negligence on the part of the owner, and the doctrine of *res ipsa loquitur*, which is only applicable when the thing shown speaks of the negligence of the defendant, not merely of the happening of the accident, does not apply."

Another closely related legal principle is that the facts that go to show negligence must be established by evidence and not left to inference. This question and other pertinent ones are discussed by the Colorado court in the case of *Thompson Grocery Co. v. Phillips*, 22 Colo. App. 428, a case where the defendant appeared at the plaintiff's place of business for the purpose of purchasing a turkey, and when approaching the counter where the birds were on display fell and seriously injured her arm. The supreme court gives this succinct summary of the facts in the case: "Then taking the testimony in its most favorable light for the plaintiff we find that she had been for some years a patron of the store, in good health with good eyesight, in a well lighted room, walked down an aisle in the meat department of the store that had just been swept, paused at a counter near a clerk to whom she was about to give an order, slipped and fell, sustaining the injuries complained of, and after being seated found a piece of fatty substance on her shoe between the ball of the foot and the instep. There is at least no stronger evidence as to defendant's negligence, and there was no testimony offered tending to contradict the evidence of the defendant as to the custom and efforts to keep its store clean and free from refuse or débris upon the floors. Neither is there any testimony tending to show that defendant could by the exercise of diligence have discovered the existence of the particular substance in question upon its floor, if it in fact was there, which at best can only be inferred from plaintiff's testimony, to the effect that she found such upon her shoe after the accident."

Later in the opinion the court draws these conclusions: "There is no testimony in the case at bar that can in any sense be said to show want of 'reasonable prudence and care,' or that the plaintiff was 'unnecessarily or unreasonably exposed to danger.' At best the testimony in this case can show only by inference that the greasy substance was on the floor." The court, after declaring

that it can find no evidence of negligence, finally concludes as follows: "In this the case of a working woman, dependent upon her labor for support, and with a probably permanent injury, is presented one which strongly appeals to both a court and jury, but to determine otherwise than we do, would be to hold that the mere fact of the accident is sufficient in itself to charge the defendant with the fault, for there does not appear from the evidence a failure upon its part to perform any duty which the law enjoins."

In the report of this case in 125 Pac. 563, these propositions are stated as pertinent to the facts:

"1. Evidence, in patron's action against a grocery company for injuries from slipping upon the floor of the store, held not to show defendant's failure to perform any duty resting upon it.

"2. Facts constituting negligence must be proved and not be left to inference.

"3. A grocery company is not liable for injuries to a patron from a fall due to her slipping upon a fatty substance on the floor, unless it or its agents knew, or by the exercise of reasonable diligence could have known, of the presence of such substance."

With the case of *Thompson Grocery Co. v. Phillips,* just discussed, in mind, let us glance at the situation which we have before us. The testimony that there was water on the step must be eliminated from our consideration, as the evidence does not show that the servants of the association had caused the water to be there, or knew of its being there, and it had not been there long enough to charge the association with knowledge and permit of its removal. There remains for consideration the wear of the step at the time of the accident as shown by exhibit 1 and the patron's statement of how she was injured. The character of the injuries are immaterial in view of the instructed verdict. We have already discussed the condition of the step as shown by exhibit 1. The patron states that, as she stepped down into where the

water stood, her right foot slipped and her ankle turned so that the bottom of her right foot was turned towards her left foot. She speaks of stepping into a depression, but exhibit 1 does not show any depression worthy to be named such. The decline, lengthwise of the step, and that was the way she says her foot slipped, was at most only one inch in a distance of two feet. It seems incredible that such a slight decline could have caused her foot to slip towards the other. The patron does not say that her foot slipped out from under her. In view of her testimony, when considered in connection with exhibit 1, we agree with the trial court that there was no justification for holding the association negligent or in concluding that the step was not reasonably safe for the use of its patrons.

There is still another question that is worthy of attention. The patron's prior knowledge of the wear of the steps, which she declares in her testimony could be seen from the street. Bear in mind that these steps furnished the outside approach to the entrance. The patron testifies that she entered the building on the day of the accident about 8:45 a. m. over the same steps and through the same door over and through which she later left. Her knowledge of the steps was therefore quite fresh in mind, as she says she was in the building about five minutes. The authorities generally hold that the risks which are obvious to a person are assumed by her, where, as in the present case, the relation is that of owner and invitee or patron. *Mullen v. Sensenbrenner Mercantile Co.*, 260 S. W. (Mo.) 982, 33 A. L. R. 176; *Hogan v. Metropolitan Building Co.*, 120 Wash. 82; *Woolworth Co. v. Graham*, 257 S. W. (Tex. Civ. App.) 574.

Mullen v. Sensenbrenner Mercantile Co., supra, is also instructive and persuasive because of its analogy to the case at bar. There plaintiff was injured while leaving by a tiled exit which she charges had an unusually slick, smooth, and glassy surface and had a dangerous angle or slope in which there was a crack, and that defendant

had failed to warn the plaintiff of these dangerous conditions. The court concluded that the defendant was not liable to the plaintiff, basing its conclusion partially, at least, upon her having a knowledge of the conditions surrounding the place of the accident through having observed that place as she entered shortly before.

Hogan v. Metropolitan Building Co., supra, is another analagous case. The plaintiff had entered the defendant's place of business, bought a pair of shoes, and in going out lost her footing on the cement way and fell. That court, in holding that as matter of law the risk was hers, refers to the fact that the accident happened as she came out, the same way she had used on entering the store, and that the situation was perfectly plain, open, and obvious, and known to her.

The case of *Woolworth Co. v. Graham, supra,* is another case of an accident to a customer while leaving the defendant's store. It seems that a customer had dropped a bottle of liquid on the floor outside the store entrance, and that a porter had been called and had attempted to clean it up. However, the patron alleged that the store had negligently permitted the liquid to remain upon the floor. The court declared that, while the evidence failed to show any negligence on the part of the defendant, it did show negligence on the part of the plaintiff in going over the particular spot, "instead of taking the obviously safe course that the most ordinary prudence would have dictated of stepping over or walking around the spot, so it is obvious that her fall and consequent injuries were brought about by her own thoughtlessness."

The conclusions of the court in the last case are of unusual significance because of its close analogy to the case at bar. The plaintiff in her testimony states that she saw the water on the step as she stepped down. There does not appear to have been any reason why she could not have stepped a few inches one way or the other and thus avoided stepping upon that particular spot where she says the water had gathered, and to which, by inference, she attributes her slipping.

This case has been ably briefed and a large number of cases have been cited by the opposing attorneys. However, an extensive analysis of these authorities would serve no useful purpose, as the legal questions involved are not much controverted; while the most of these questions involve negligence based upon facts which present but little similarity to those upon which the plaintiff claims negligence herein.

The trial court, therefore, was right in discharging the jury and in dismissing the plaintiff's cause of action. The judgment is

AFFIRMED.

WILBUR F. BRYANT, APPELLANT, V. CEDAR COUNTY, APPELLEE.

FILED MARCH 25, 1932. No. 28163.

Limitation of Actions: COUNTIES. The statute of limitations, section 20-206, Comp. St. 1929, applies to claims against counties.

APPEAL from the district court for Cedar county: MARK J. RYAN, JUDGE. *Affirmed.*

Wilbur F. Bryant, pro se.

Clarence E. Haley, contra.

Heard before GOSS, C. J., DEAN, GOOD, DAY and PAINE, JJ., and LANDIS and RAPER, District Judges.

RAPER, District Judge.

The petition of plaintiff, Wilbur F. Bryant, alleges that the county of Cedar is indebted to him on account of certain sums of money paid for official recording while he was county judge. The items are for several dates between January 2, 1918, and January 7, 1919. There is no allegation that said account was audited or passed on by the county board; nor is a written agreement pleaded. The county of Cedar demurred to the petition on the ground that the claim was barred by the statute of limitations. The demurrer was sustained and plaintiff's action dismissed. From that judgment he appeals.

This court held in an opinion by Judge Reese, in *May v. School District*, 22 Neb. 205, that the statute of limitations applies for or against school districts and other municipal corporations deriving their power from the sovereign. Counties come within the purview of this principle of law. In *Arapahoe Village v. Albee*, 24 Neb. 242, this court held that a registered village warrant was barred in five years from the time it became due. The statute of limitations runs in favor of a county, as it does in favor of school districts and cities.

The judgment of the district court is

AFFIRMED.

MAUD N. HAMILTON, APPELLANT, V. FRED D. WEAD, APPELLEE: MAUD N. HAMILTON, TRUSTEE, APPELLANT.

FILED MARCH 25, 1932. No. 27889.

1. **Contracts:** CONSTRUCTION. Written contract set out in opinion construed.
2. ———: ———. In the construction of a contract, not only the express terms but what is necessarily implied from those terms should be considered.
3. ———: ———. Where the context of a written contract clearly implies or suggests that a certain word has been omitted, such word will be supplied by construction to fully express the intention of the parties.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Reversed, with directions.*

A. H. Murdock and *Arthur C. Pancoast*, for appellant.

Swarr, May & Royce, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and REDICK, District Judge.

REDICK, District Judge.

March 13, 1906, C. Will Hamilton, party of the first part, and Fred D. Wead, party of the second part, entered into a contract, the terms of which were as follows:

"Memorandum of Agreement

"By and between C. Will Hamilton, hereafter known as party of the first part, and Fred D. Wead, the party hereafter known as party of the second part, witnesseth:

"That whereas, Fred D. Wead has purchased for C. Will Hamilton the following described property: * * * for the sum of $4,900; and whereas said party of the first part proposes furnishing the money necessary to purchase said property it is therefore mutually agreed as follows:

"First. That said party of the first part pays for and takes title to said property.

"Second. That said second party takes charge of and cares for said property, collecting rent and making such repairs as seems necessary, paying taxes, both regular and such instalments of special taxes before they become delinquent each year during the term of this contract.

"Third. It is understood that said party of the first part is to receive six per cent. interest per annum, payable semiannually on the money he invests in purchasing said property whether the property rents for sufficient amount to pay that or not, after making necessary repairs. Said party of the second part to make up from his own funds any deficit in rents so that said first party shall in no event receive less than six per cent. interest semiannually.

"Fourth. Any excess received from rent above six per cent. after paying necessary repairs and taxes is to be divided equally between the parties hereto.

"Fifth. When it is deemed advisable to sell said property by said second party, at not less than purchase price, said first party is to make conveyance and receive the consideration thereof, until the purchase price this day paid is fully refunded together with interest aforesaid.

"Sixth. It is further agreed if after five years from date in case the above described property has not been sold or disposed of and the party of the first part not reimbursed for all moneys paid out by him, be it pur-

chase money or moneys paid for taxes or repairs on said property, then said party of the second part shall pay said party of the first part 50 per cent. of the amount still invested and receive a deed for an undivided one-half of said property or as much thereof as has not been previously disposed of, subject to special taxes not delinquent.

"Seventh. When party of the first part shall have received payment in full of his principal and interest from sale of said property, then the remainder of the property, if any, shall belong to the parties to this agreement in equal shares.

"The intention of this agreement being that said C. Will Hamilton is first guaranteed repayment of principal and six per cent. interest on purchase price of said property, and that profits or losses shall be shared equally by the parties hereto.

"This agreement to be binding upon the respective heirs and assigns of the parties hereto.

"Executed this 13th day of March, A. D. 1906.

"Executed in duplicate in presence of Pauline Prince.

"(Signed) C. Will Hamilton.

"(Signed) Fred D. Wead."

The agreement, it will be noted, was originally for the term of five years, but on June 8, 1912, by mutual consent, the time was extended to May 19, 1916. Subsequent to that date, however, the contract was treated and acted upon by both parties as still subsisting up to the death of Hamilton January 14, 1928, the defendant Wead retaining possession and control of the property, collecting the rents, paying the expenses and taxes, and paying to Hamilton 6 per cent. interest on the purchase price, $4,900, until November, 1927.

By the will of Hamilton, after devising and bequeathing his estate to be held in trust, said Hamilton bequeathed to his widow, Maud N. Hamilton, plaintiff, "all of the annual income of said estate so held in trust to be used and enjoyed by her during the term of her natural life for her own sole and separate use."

The present action was brought by plaintiff to recover $588 and interest, being two years' interest claimed to be due under said contract from November, 1927, to November, 1929. Defendant Wead filed an answer and cross-petition in which he alleged that he was not obligated to guarantee or pay interest on said investment subsequent to May 19, 1916; that the transaction evidenced by said contract was a joint venture, and that defendant had paid more than half of the cost of the venture; that any interest of the plaintiff in said contract was held by her as trustee under another provision of the will, and prayed that said trustee be made a party defendant, which was done, and for an accounting of the amount due defendant under said contract, and that the same be declared a lien upon the interest of said trustee in said real estate. Replies were filed by Maud N. Hamilton as an individual and trustee, putting in issue the allegations of the answer.

It appears from the record that defendant Wead has paid out the following amounts:

Interest on $4,900 to November, 1927, to Hamilton,	$6,174.00
Taxes, including 1929, the sum of	6,089.17
Expenses, including 1930, the sum of	2,143.24

He collected rents, including 1930, in the sum of $6,438.21. It will therefore be noted that the taxes and expenses paid ($8,232.41) were in excess of the income ($6,438.21) in the sum of $1,794.20, which represents the total amount of Wead's investment in the venture, leaving out of consideration the interest paid to Hamilton ($6,174).

By decree of the district court it was found that the interest paid by Wead to Hamilton was a voluntary payment and that Wead was not entitled to credit therefor, nor any interest thereon. With this finding we concur. It was then found that Wead had paid out $7,968.20 more than he had received and treated this amount as the investment Wead had in the property. The above amount was arrived at by adding together the three items paid by Wead, viz., interest $6,174, taxes $6,089.17, and ex-

penses $2,143.24, total $14,406.41, and deducting therefrom amount received, $6,438.21, remainder $7,968.20. Discarding the fraction, this amount was compared with $4,900 taken as amount of Hamilton's investment, and respective interests in the property declared to be: Wead 7968/12868, Hamilton 4900/12868, and ordered partition in those proportions. Maud N. Hamilton individually and as trustee appeals.

The principal dispute arises over the allowance of the interest paid by Wead to Hamilton to be considered as a part of Wead's investment, and in view of the finding that Wead's payment of interest was voluntary and that he is not entitled to any credit therefor, we are unable to understand why it should be included in the figure $7,968. On the basis of the findings the proportions should be: Wead 1794/6694 and Hamilton 4900/6694.

The property has probably decreased in value, and partition other than by sale does not seem practicable; it will be interesting, therefore, to glance at the results should the property be sold under the decree of the district court:

Under the decree if the property sold for		$12,868
Wead's share	$7,968	
Hamilton's share	4,900	12,868

This would simply give Hamilton his money back with interest, to which he is entitled *before any profits or losses are divisible.* Wead would make a profit of $7,968 less $1,794; in other words, Wead gets $6,174, interest on $1,794, and Hamilton the same amount on $4,900, and this notwithstanding Hamilton's investment of $4,900 has run for 24 years while Wead's $1,794 has accumulated during that period. Wead would therefore receive over 14 per cent. on his investment if he had put $1,794 into the original purchase price.

The same result in proportion is reached if the property sells for ½ or ¼ of the above price, e.g.:

If property sells for ¼		$3,217
Wead's share	$1,992	

Hamilton's share		1,225	3,217
Wead's profit	$1,992 less $1,794		198
Hamilton's loss	4,900 less 1,225		3,675

It seems to me these results demonstrate the incorrectness of the decree.

Upon the proper basis, as above suggested, and property sells for $6,694

Wead's share	$1,794	
Hamilton's share	4,900	6,694

Hamilton receives his money back with interest and Wead is made whole on his investment, but is out the interest paid to Hamilton which he was to make good "from his own funds" in case of a deficit in rents. (Par. 3 of contract.)

If property sells for ½ above $3,347

Wead's share	$ 897	
Hamilton's share	2,450	3,347

To equalize the losses Wead must pay Hamilton $776.50, thus the loss of each would be $1,673.50 or ½ of $3,347.

In the above illustrations the sale figures are considered net.

That Hamilton was to receive 6 per cent. on his investment, *at all events,* is clearly established by five provisions of the contract, viz.: Third. Hamilton "is to receive six per cent. interest per annum, payable semiannually on the money he invests in purchasing said property whether the property rents for sufficient amount to pay that or not, after making necessary repairs. Said party of the second part to make up from his own funds any deficit in rents so that said first party shall in no event receive less than six per cent. interest semiannually." Fourth. "Any excess received from rent above six per cent. after paying necessary repairs and taxes is to be divided equally between the parties hereto." Fifth. Upon sale of property at not less than purchase price, first party to receive the purchase price together with interest aforesaid. Seventh. When Hamilton "shall have received payment in full of his principal and interest

from sale of said property, then the remainder of the property, if any, shall belong to the parties * * * in equal shares." The intention being that "Hamilton is *first* guaranteed repayment of principal and six per cent. interest on purchase price."

There is nothing in the contract indicating that Hamilton shall refund to Wead any interest, and yet by the decree under review he is required so to do to the extent of 50 per cent. by the inclusion of interest paid as part of Wead's investment.

It is claimed by appellee that the contract should be treated as terminated upon the expiration of the five-year extension, but this is quite inadmissible. The parties treated the contract as existing for nearly twelve years thereafter until the death of Hamilton, Wead continuing to manage the property and paying interest according to its terms. In fact, no step was taken by either party to terminate the contract until the filing of the cross-petition in this case by Wead. Such action was open to either party during that period, but, not having been taken, the conduct of the parties under it is conclusive evidence that it was considered still in force, and the law so declares.

It is further claimed by appellee that under the sixth paragraph of the contract Hamilton was to advance money for taxes and repairs, but there is nothing in the language of that or any other part of the contract warranting such claim. True, that paragraph provides that if property has not been sold after five years and Hamilton not reimbursed for all moneys paid out by him, "be it purchase money or moneys paid for taxes or repairs," then Wead shall pay 50 per cent. of the amount still invested and receive a conveyance of one-half of the property. Technically considered, Wead would be required to tender or pay Hamilton 50 per cent. of the purchase price before he would be entitled to a conveyance or become the owner of one-half; but both parties seem to consider this paragraph operative upon any sale of the property and

such construction appears proper and equitable, and we adopt it.

Let us see what the situation would have been if the property had been sold after the five-year extension, say at end of year 1916 for $4,900 net:

Expense to that date	$ 894.41
Taxes	2,316.73
	3,211.14
Rents	2,602.44
Loss in operation	$ 608.70

Hamilton would receive his money back and would have to pay Wead $304.35.

The lower court found that the contract was a joint venture, and then proceeded to adjudicate the rights of the parties on a 50-50 basis. But joint ventures are not always on that basis, and the present one surely not. Wead paid no portion of the purchase price, but in addition guaranteed Hamilton should first receive his money back with 6 per cent. interest. The contract or venture in short was this: Wead was a realtor and was convinced that the property in question was a good speculation in view of the fact that it was seriously contemplated that a new Union Station would be built in the vicinity, and that this property would be needed or would greatly increase in value. Hamilton was a wealthy banker, as suggested by counsel for appellee. The banker was probably concerned about the safety of his principal and interest; so it was arranged that Hamilton put up the purchase price, Wead to manage the property, and after repaying Hamilton, the anticipated profits would be divided equally when the property was sold; or if there was a loss it should be borne equally after Hamilton had been repaid. Suppose the property had been sold the next day after its purchase for $4,000, Hamilton would be entitled to the money and Wead would have had to pay him $450 in addition. Can there be any question about this?

Appellee contends that the entire contract, taken to-

gether, should be construed and enforced by comparing the total moneys paid out by each party, the difference representing the loss; and special stress is laid upon the second part of the seventh paragraph reading as follows:

"The intention of this agreement being that said C. Will Hamilton is *first guaranteed repayment of principal and six per cent. interest* on purchase price of said property, and that profits or losses shall be shared equally by the parties hereto." (Italics ours.)

Appellants claim that the provision as to profits or losses must be disregarded as "hopelessly irreconcilable with the remainder of the contract;" but such course is not necessary, if permissible.

In the construction of contracts as well as statutes it is often necessary to supply a word which the context indicates was intended to be inserted by the parties or which is necessary to express the real intent. A contract is to be construed upon what it expresses in terms and what is necessarily implied from those terms. *Goodrich v. Hubbard,* 51 Mich. 62. Omitted words clearly in place by implication may be supplied by construction of a statute. *Irwin v. Nichols,* 87 Ark. 97; *Dodd v. Mitchell,* 77 Ind. 388; *State v. Railroad Commission,* 137 Wis. 80.

It would seem clear that interest and principal are excluded from "profits and losses" by the requirement that it be "first guaranteed," and the context suggests the word to be supplied in order that the writing may express the full intention of the parties.

In this sentence the word "then" or "thereafter" must be considered as implied or understood between the words "and" and "profits," as otherwise the words "first guaranteed" have no meaning. When one thing or operation is placed "first," any other thing or operation must necessarily follow. Two things cannot be first. In the sentence "We will first go to the opera and to supper" the word "then" is understood.

For the reasons above stated we think the learned district judge erred in the construction of the contract and the judgment must be reversed.

Inasmuch as neither party took any step to terminate the contract until the filing of the cross-petition herein, we have experienced some difficulty in fixing the time at which it should be terminated, but have concluded to fix it at the date of filing of this action, at which time litigation began.

It is therefore ordered that the judgment of the district court be reversed and the cause remanded, with directions to state the account between the parties at the time of such accounting; that the investment of Hamilton shall be $4,900, plus interest at 6 per cent. to date of suit, and that of Wead the total amount of taxes and expenses paid less rents received, and that partition be ordered in the proportion thus determined.

In case partition cannot be made, that the property be sold and proceeds applied, first, to payment of Hamilton's principal and interest, second to Wead's investment, any balance to be divided equally.

If the proceeds of sale are insufficient to satisfy the investments of both parties in full, they shall be applied, first, to the payment of Hamilton, second to Wead, and any loss to be borne equally, and decree rendered requiring payment necessary to equalize such loss to the party entitled.

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1931, AND JANUARY TERM, 1932

ALBERT BULKOWSKI, APPELLEE, V. CHARLES N. HERTERT, APPELLANT.

FILED NOVEMBER 10, 1931. No. 27901.

APPEAL from the district court for Cedar county: MARK J. RYAN, JUDGE. *Affirmed.*

P. F. O'Gara, for appellant.

Peterson & Barta, contra.

Heard before ROSE, GOOD, DAY and PAINE, JJ., and BEGLEY, District Judge.

PER CURIAM.

This is an action in the nature of a creditors' bill by which plaintiff seeks to recover money alleged to have been transferred to defendant Charles N. Hertert by John Isbaner, the judgment debtor. The trial court found for plaintiff and defendant Charles N. Hertert has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

E. S. FLOWER, APPELLEE, V. OTTO JENSEN ET AL., APPELLANTS.

FILED NOVEMBER 10, 1931. No. 27903.

APPEAL from the district court for Cedar county: MARK J. RYAN, JUDGE. *Affirmed.*

Davis, Hendrickson & Davis, for appellants.

H. E. Burkett, contra.

Heard before ROSE, GOOD, DAY and PAINE, JJ., and BEGLEY, District Judge.

PER CURIAM.

Plaintiff brought this action in the district court for Cedar county to foreclose a real estate mortgage. The trial court found for plaintiff and defendants have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

NATIONAL CASH REGISTER COMPANY, APPELLANT, V. HARRY B. CHIPMAN, APPELLEE.

FILED NOVEMBER 10, 1931. No. 27905.

APPEAL from the district court for Hitchcock county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Scott & Scott, for appellant.

J. F. Ratcliff, contra.

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and RAPER and RYAN, District Judges.

PER CURIAM.

This is an action brought by the appellant, National Cash Register Company, plaintiff below, to recover the amount of a promissory note alleged to have been made and delivered to it by the defendant below, appellee here.

So far as material, the answer, as well as the basis of the cross-petition, included the allegations that the only consideration for the note in suit, as well as for a certain sum of money alleged to have been paid by defendant to plaintiff, was an executory written contract of purchase entered into by the parties, by the terms of which the cash register company agreed to sell, deliver and install register No. 1098, represented by the plain-

tiff's agent to be "a combination cash register and calculating machine, which would perform mechanical calculations." Subsequent to the making of this contract, the payment of the sums sought to be recovered in the cross-petition, and the execution and delivery of the promissory note, a machine was shipped by the plaintiff to defendant, and by the latter, upon examination, returned to the sender for the reason, alleged in behalf of the purchaser, that it had no calculating attachment, and was not as represented. The plaintiff denied the making of the representation that the machine in question was a combination cash register and calculating machine. There was a trial to the court, in which a jury was waived by the parties, and a finding and judgment for the defendant as prayed in his answer and cross-petition.

Plaintiff's evidence, it may be said, was to the effect that no such representation was made at the time of the making of the contract. Two witnesses in behalf of the defendant contradicted plaintiff's evidence, and testified to the making of the representation substantially as alleged. On this controverted evidence the trial court evidently determined the pivotal fact in favor of the defendant, and entered a judgment in his favor.

This being a law action, the case is not here for trial *de novo*, and the findings of the trial court must be given the same effect as a verdict of a jury. We are satisfied, in view of the testimony in the record, that it cannot be said that the evidence is insufficient to support the judgment.

It follows, therefore, that the judgment of the trial court is correct, and it is

AFFIRMED.

IRENE BROWN, APPELLEE, V. CLARENCE A. BROWN, APPELLANT.

FILED NOVEMBER 10, 1931. No. 27948.

APPEAL from the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Affirmed as modified.*

York & York, for appellant.

F. J. Byrd and *Drake & Drake, contra.*

Heard before ROSE, GOOD, DAY and PAINE, JJ., and BEGLEY, District Judge.

PER CURIAM.

This is a suit in equity by a wife for a divorce from her husband on the ground of extreme cruelty. The facts constituting the alleged cruelty are stated in the petition. The parties to the suit are the parents of four children, and plaintiff prayed for their custody, for an allowance for their support, and for permanent alimony. Defendant denied the cruelty charged by plaintiff, and prayed for a divorce in his favor on the ground of extreme cruelty on the part of plaintiff. Upon a trial of the cause the district court found the issues in favor of plaintiff, granted her a divorce, gave her custody of the children, and allowed her permanent alimony in the sum of $1,566.66, and in addition $20 a month for the support of the children. Defendant appealed.

Upon a trial *de novo* the findings of fact are the same as the findings of the district court on the issues as to divorce, as to extreme cruelty, as to the custody of the children, as to the allowance for their support, and as to the amount of alimony. Owing to the present pecuniary situation of defendant, however, the amount of alimony allowed by the district court is made payable as follows: One hundred dollars when the mandate is received by the clerk of the district court, and $100 every three months thereafter until the entire sum of $1,566.66 is paid, deferred payments not to bear interest until due. The judgment below is modified accordingly and as thus modified is affirmed.

AFFIRMED AS MODIFIED.

CLARKE-BUCHANAN COMPANY, APPELLEE, V. GIDEON B. HARDIN, APPELLANT.

FILED NOVEMBER 20, 1931. No. 27909.

APPEAL from the district court for Furnas county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Perry, Van Pelt & Marti, for appellant.

Herman G. Schroeder, Franklin L. Pierce and *J. L. Fults, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and REDICK, District Judge.

PER CURIAM.

This is an appeal from an order confirming a sale of farm lands under a decree of foreclosure entered November 20, 1929. The decree was for $6,311.51 for plaintiff, as a first lien, for $1,391.22 for a cross-petitioner, as a second lien, and for $5,325.25 for another cross-petitioner, as a third lien. The order of sale was stayed and did not issue for nine months. On September 29, 1930, the sheriff sold the land to the highest bidder for $7,900. A motion was duly filed to set aside the sale on the ground of inadequacy of sale price, alleging that the land was worth at least $12,000 to $14,000. Testimony was taken by the court on November 26, 1930, as to the value of the 240 acres involved. Witnesses for the plaintiff placed the value at from $7,200 to $8,000; those for the defendants at from $9,000 to $12,000. Gideon B. Hardin testified that a little over a year before a certain man called at his house and offered $12,000 for the land. The court postponed action until 9 o'clock a. m., January 5, 1931, to give the defendant Hardin an opportunity to secure one who would agree to bid not less than $8,500 and who would deposit with the sheriff $500 to insure the carrying out of his offer if a resale was ordered. On January 5, 1931, no such offer having been secured, the court overruled the objections and confirmed the sale. There does not appear any such inadequacy of price, even considering the values set by wit-

nesses for the defendant, as to indicate any fraud or mistake, and for that reason this court is not required to set aside the confirmation of this judicial sale. *First Nat. Bank v. Hunt,* 101 Neb. 743; *Lindberg v. Tolle,* 121 Neb. 25. The trial court heard and saw the witnesses. We find no valid reason for setting aside the judgment of the district court. It is affirmed, with leave to redeem at any time before the issuance of the mandate.

AFFIRMED.

CLIFTON J. WERNER, SPECIAL ADMINISTRATOR, APPELLANT, V. GUY JOHNSON ET AL., APPELLEES.

FILED NOVEMBER 20, 1931. NO. 27957.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Grant G. Martin, J. A. McGuire and *Bartos, Bartos & Placek,* for appellant.

Chambers & Holland and *C. Russell Mattson, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and REDICK, District Judge.

PER CURIAM.

This action was commenced in the district court for Lancaster county by Clifton J. Werner, as special administrator of the estate of Lucinda O. Drummond, deceased, to recover damages for certain injuries alleged to have been sustained by the decedent in a collision between two automobiles on a highway, on or about August 4, 1929, when the automobile in which the decedent was riding, and which was then being driven by her husband, collided with an automobile being driven by Mrs. Eva Hedglin, but then owned by the defendant firm of Johnson & Strom, dealers in automobiles. The action was dismissed as to Mrs. Hedglin, and the court directed a verdict in favor of the defendants Johnson and Strom. The administrator has appealed.

The record discloses that at the time in question here Mrs. Hedglin was a prospective purchaser of an automobile, but nothing more than this appears in her dealings with the firm. On the day in question, an agent for the defendant firm turned the car over to Mrs. Hedglin merely for trial and, subsequently, while she was driving on the highway, but unaccompanied by an agent or representative of the firm, the accident herein occurred. It appears that two days thereafter, namely, on August 6, 1929, the decedent, in the presence of her husband, signed a statement absolving the defendant firm and Mrs. Hedglin from any liability in the premises and at the same time she accepted $96 from the defendants as satisfaction for any claims that might arise from the accident.

The plaintiff contends that the relationship of master and servant existed between the defendant firm and Mrs. Hedglin at the time of the accident and that the firm is therefore liable for any negligence of Mrs. Hedglin. Upon an examination of the record and the law applicable thereto, however, we conclude that the evidence does not sustain the contention of the plaintiff. Mrs. Hedglin was driving the car, not as an agent of the defendant company, but as a prospective purchaser. The essential elements existing in the relationship between master and servant that go to constitute liability on the part of the defendant firm here are lacking in the facts before us. The trial court did not err in directing a verdict for the defendants.

The judgment is right and is

AFFIRMED.

MINNEAPOLIS-MOLINE POWER IMPLEMENT COMPANY, APPELLANT, V. PAUL HANES, APPELLEE.

FILED NOVEMBER 20, 1931. No. 27964.

APPEAL from the district court for Perkins county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Hastings & Hastings and *C. D. Ritchie*, for appellant.

Halligan, Beatty & Halligan and *Milton C. Murphy, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and REDICK, District Judge.

PER CURIAM.

This action in replevin was commenced in the district court for Perkins county by the Minneapolis-Moline Power Implement Company, the plaintiff, wherein Paul Hanes is the defendant, to obtain possession of two tractors on the grounds hereinafter pointed out. The jury found in favor of the defendant. The plaintiff has appealed.

The record discloses that, on or about April 9, 1929, the defendant executed two promissory notes in the sum of $575 each, and both were made payable to Charles H. Clemens & Son, a partnership. The notes bear interest at the rate of 8 per cent. per annum until paid and, to secure their payment, the defendant executed and delivered a chattel mortgage on the two tractors above designated. Subsequently the notes and the mortgage were sold and assigned by Charles H. Clemens & Son to the Minneapolis Steel & Machinery Company and by the latter company sold and conveyed to the plaintiff company. The defendant, as contended by the plaintiff, made default in the payment of the notes and thereupon this suit was begun.

The defendant contends that, on or about May 26, 1930, and as a part of the purchase price of certain combines, he delivered to the plaintiff a "Baldwin" combine, valued at $900, and that, at or about the same time, he paid the plaintiff $160, making a total payment of $1,060 for the combines so purchased. The defendant also contends that the combines were warranted to do satisfactory work and that they were represented by the plaintiff as being capable of doing effective work on the most hilly land. But he contends that the machines were unsuited to the purpose for which they were represented by the plaintiff and that he was unable to use them, and that he therefore returned the combines to the plaintiff or its agent.

The evidence appears to establish the fact that the combines were purchased by the defendant upon false representations made by the plaintiff or its agents and that the combines failed to do the work in the effective manner in which they were represented by the company. Pursuant to our former decisions, in cases wherein a like principle was involved, we conclude that the defendant was well within his rights in returning the combines to the plaintiff's agent. Where the representations in respect of the combines were false, and the jury's verdict so announced the fact to be, the defendant of course was justified in rescinding the contract by a return of the property so purchased. *Sanders v. Nightengale,* 109 Neb. 667; *Advance-Rumely Thresher Co. v. Bartzat,* 114 Neb. 35.

We have examined the instructions complained of, but we do not find reversible error therein. The judgment is

AFFIRMED.

ALICE BRISSEY, APPELLANT, V. WILLIAM A. BRISSEY, APPELLEE.

FILED NOVEMBER 20, 1931. No. 27968.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed as modified.*

C. E. Walsh, for appellant.

Herman E. Kuppinger and *Patrick W. O'Connor, contra.*

Heard before ROSE and GOOD, JJ., and CHAPPELL and LANDIS, District Judges.

PER CURIAM.

In the district court for Douglas county, Alice Brissey, plaintiff, procured a divorce from her husband, William A. Brissey, defendant, March 25, 1927, and also an order requiring him to pay her $10 a week as alimony. When he was in default to the extent of $60 his wages were garnished for that amount and he filed in the divorce suit February 13, 1931, a petition to vacate the

order for alimony on the ground of changed conditions. Plaintiff by answer to the petition challenged defendant's asserted right to such relief. Upon a trial of the issues the district court found that, owing to changed conditions, defendant was entitled to be released from further payments of alimony, including the $60 for which his wages had been garnished, and entered a judgment accordingly. Plaintiff appealed.

Upon a trial *de novo* the conclusion is that changed conditions and equity required discontinuance of alimony from the date upon which defendant filed his petition to reform the original decree as to alimony, but that he should be required to pay the $60 for which he was then in arrears. As thus modified the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

FRANK RENDLA, APPELLEE, V. JACOB FRANZENBURG, APPELLANT.

FILED NOVEMBER 24, 1931. No. 27969.

APPEAL from the district court for Washington county: CHARLES E. FOSTER, JUDGE. *Affirmed.*

Cook & Cook, for appellant.

A. A. Rezac, contra.

Heard before ROSE, GOOD and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

PER CURIAM.

This is a suit in equity to establish a chattel mortgage and to recover the balance of the purchase price on an ice box and other merchandise sold to defendant. The trial court found in favor of plaintiff for $659.50, the balance due on the contract, and that defendant should recover $150 on his cross-petition alleging damages by reason of defective merchandise, and entering a judgment for $509.50. The defendant appealed.

The evidence shows that the machine and equipment were serviceable and have been used continuously since their installation in January, 1929. There is much evidence concerning the expense of installation, but it is clear that the plaintiff did not agree to install the ice box; and that much of it was caused by the defendant changing its character and appearance.

We conclude that the plaintiff should recover from the defendant the sum of $509.50. The judgment of the trial court is

AFFIRMED.

ANNA M. DOYLE ET AL., APPELLANTS, V. EMMA G. PREHN, APPELLEE.

FILED DECEMBER 11, 1931. NO. 27955.

APPEAL from the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

P. I. Harrison and *J. L. Richards,* for appellants.

Finlayson, Burke & McKie and *Leslie J. Taylor, contra.*

Heard before ROSE, GOOD and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

PER CURIAM.

This is an appeal from a decree of the district court for Thayer county denying partition of certain real estate described in the petition.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

RASSE WHOLESALE GROCER COMPANY, APPELLEE, V. JAMES L. ASHENFELTER, APPELLANT.

FILED DECEMBER 11, 1931. NO. 27960.

APPEAL from the district court for Gage county: FREDERICK W. MESSMORE, JUDGE. *Affirmed.*

Loren H. Laughlin, for appellant.

Mockett & Finkelstein and *S. D. Killen, contra.*

Heard before ROSE, GOOD and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

PER CURIAM.

Plaintiff recovered judgment against defendant in the district court for Gage county on an account for goods sold and delivered. Defendant has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

LAWRENCE J. WOOD, APPELLANT, V. MCGINLEY CREDIT CORPORATION, APPELLEE.

FILED DECEMBER 16, 1931. No. 27973.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

James A. Hayward, for appellant.

Claude S. Wilson, Roy F. Gilkeson and *Hymen Rosenberg, contra.*

Heard before ROSE and GOOD, JJ., and CHAPPELL and LANDIS, District Judges.

PER CURIAM.

Plaintiff sought by this action to set aside a default judgment entered against him in the municipal court of Lincoln. The trial court found for defendant and plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

MARGARET DUNCAN ET AL., APPELLEES, V. FRANK ROSS ET AL., APPELLANTS.

FILED DECEMBER 16, 1931. No. 27974.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

D. O. Dwyer and *W. L. Dwyer*, for appellants.

Patrick & Smith, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and REDICK, District Judge.

PER CURIAM.

James Alloway brought this action for the possession of a farm and for rents and profits for the time defendants kept him out of possession. Later the present plaintiffs purchased Alloway's interest and were duly substituted for him. Defendants filed an answer and cross-petition, alleging that, when the action was commenced, they were in possession of the land as owners of certain rights therein to which the rights of plaintiffs were subject, and that there was no consideration for the deed which purported to convey the lands to plaintiffs. By a cross-petition the defendants alleged that the land was purchased at judicial sale by Alloway and defendants for $8,500, subject to a mortgage of $4,500, so that $4,000 in cash was paid, of which Mirth Ross (who is the only daughter of Alloway) paid $3,136 and Alloway $864; that the title was taken in Alloway's name, who held the title in trust for defendants as to 98/125 thereof and for himself as to the other 27/125 thereof; that defendants entered into possession as owners and, under a certain agreement with Alloway, occupied the land and made valuable improvements under the expectation that he would perform all the conditions. The agreement pleaded is that, if the defendants would refrain from moving to Minnesota, as they contemplated, he would join them in the purchase of this land, which they would occupy as their home, and that, at his death, it should belong to said Mirth Ross. They pleaded in detail their performance of the condi-

tions. In reply, plaintiffs denied generally, and pleaded that the defendants went into possession of the land as tenants and continued as such, paying a share of the crops as rent until March 1, 1928, since which time, by reason of nonpayment of rent, they have unlawfully held possession.

A jury was waived and a trial had to the court. The court found that the entire purchase price of the land was paid by Alloway and that the defendants paid or contributed no part thereof; that defendants went into possession merely as tenants of Alloway, under an oral agreement to pay as rent one-half of the annual grain crops; that they paid such agreed rental for 1926 and for a part of 1927, but since that have paid no rent at all; that they are estopped to question the title of plaintiffs, as grantees of Alloway, and are not entitled to recover for repairs or improvements voluntarily made as tenants. Their cross-petition was dismissed. Plaintiffs were adjudged entitled to possession of the land.

Examination of the evidence shows there was sufficient competent evidence to sustain the findings of the district court. "When a jury is waived, and a cause tried to the court, its finding of fact will not be disturbed if there is sufficient competent evidence to sustain the finding." *Dravo-Doyle Co. v. Metropolitan Water District*, 102 Neb. 184. It is unnecessary to cite the many other cases to the same effect.

The judgment of the district court is

AFFIRMED.

HAWKEYE TIRE AND RUBBER COMPANY, APPELLANT, V. E. A. PEGAU, APPELLEE.

FILED DECEMBER 16, 1931. No. 27983.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

W. A. Ehlers and *H. A. Myers*, for appellant.

Mossman, Anderson & Meissner, contra.

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

PER CURIAM.

Plaintiff brought this action to recover damages under section 20-1030, Comp. St. 1929, for an alleged untrue answer filed by defendant as garnishee. The district court for Douglas county found for defendant and plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ANDREA PRIMIANO, APPELLEE, V. RUSSELL VENUTO, APPELLANT.

FILED DECEMBER 18, 1931. No. 27984.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Kennedy, Holland & De Lacy and *Edwin Cassem,* for appellant.

J. W. McGan and *F. L. Burbridge, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

PER CURIAM.

This is a personal injury action brought by Primiano against Venuto and another for injuries sustained by Primiano when he was struck by an automobile then personally operated by the defendant Venuto. There was a trial to a jury resulting in a verdict of $2,500 for plaintiff. From the order overruling the motion for a new trial the defendant Venuto appeals.

But two assignments of error are presented by appellant's brief for the consideration of this court, viz.: The verdict and judgment are not sustained by sufficient evidence; and the amount thereof is excessive. The cor-

rectness of the instructions given by the trial court in submitting the case to the jury are not questioned by appellant, save and except that he contends that the court erred in overruling his motion for a directed verdict at the close of the evidence. It follows that, in all respects and in all essentials, we have here presented as a primary question: Did the jury correctly apply to the evidence presented to them the rules of law contained in the instructions of the court?

The record before us discloses, as is usual in cases of this class, conflicting evidence as to the material facts of the transaction involved. This conflict was, of course, for the jury to resolve and determine. Of the credibility of witnesses the jury necessarily were the proper judges. In this aspect of the case it is plain that there is in the record testimony which, if believed, is ample to establish the defendant's negligence, negative contributory negligence on the part of plaintiff, and to support the amount of the recovery. It would serve no good purpose to detail this evidence at length.

It follows, therefore, that the action of the trial court complained of is amply supported by the record before us, and is, in all things,

AFFIRMED.

E. P. REILLY ET AL., APPELLANTS, V. RICHARD M. LAVERTY: OAKLAND STATE BANK, APPELLEE.

FILED DECEMBER 18, 1931. No. 27994.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Rose, Wells, Martin & Lane and *Griffin, Griffin & Griffin*, for appellants.

Gaines, McGilton, McLaughlin & Gaines and *C. O. Stauffer, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

PER CURIAM.

This action was begun in the district court for Douglas county by E. P. Reilly and William Sullivan, a partnership, and plaintiffs herein, against the following defendants, namely, Laverty Brothers, a partnership, and the Oakland State Bank. Plaintiffs seek an accounting in respect of certain funds whereof they allege that the above named defendants are trustees and that such funds represent the proceeds from the sale of cattle to Laverty Brothers.

The record discloses that, on or about October 30, 1927, the plaintiffs sold 60 steers to Martin Fredstrom, for which Fredstrom gave to them his promissory note in the sum of $5,425.85, payable April 29, 1928, and as security therefor Fredstrom executed a mortgage wherein the steers were given as security. Plaintiffs contend that, pursuant to the terms of the mortgage, Fredstrom agreed that the steers should not be removed from Burt county without the written consent of the plaintiffs, but that, notwithstanding the agreement, Fredstrom removed the steers from Burt county and shipped them to South Omaha, where they were sold to Laverty Brothers, and it appears that the proceeds of the sale were transmitted by Laverty Brothers to the defendant bank.

The plaintiffs' argument is that the defendants at all times material to this inquiry had full knowledge of the plaintiffs' rights in the premises, but that the defendants utterly disregarded such rights. The plaintiffs' contention is that the defendants became and are now trustees of the proceeds arising from the sale of the steers, but that the defendants have refused to comply with the demand of the plaintiffs for a delivery of such funds.

The bank alleged that any remittances received by Fredstrom were received by him direct from Laverty Brothers, and that any and all money withdrawn by him was in the regular and usual course of business; and that none of the money in question was used to apply on any indebtedness owing by Fredstrom to the bank. The bank denied that it held the funds as trustee at any time for the benefit

of the plaintiffs, and also denied that it at any time had any knowledge or information that the plaintiffs claimed an interest or right or title thereto. After the submission of the evidence the court dismissed the action as to Laverty Brothers. And, in its decree, the court found for the bank and dismissed the plaintiffs' petition on the ground of want of equity. The plaintiffs have appealed.

It appears that, in another action, the plaintiffs obtained a judgment against Fredstrom for $5,425.85, together with interest thereon at 8 per cent. from October 29, 1927, costs, and attorney's fees, but that no part of such judgment has been paid.

Fredstrom sold the mortgaged cattle to Laverty Brothers in March and some in February, 1928, and within a week thereafter the plaintiffs were notified of the sale. And it appears that Fredstrom was willing to pay the amount of his note in the event that a settlement or allowance was made for certain of the cattle which it is alleged were diseased. The proceeds of the sale of the cattle were deposited in the defendant bank. That the plaintiffs knew of such deposit appears from certain correspondence in the record. But the plaintiffs do not appear to have made any claim against such funds for approximately a year and a half thereafter. And where the plaintiffs had knowledge of the sale of the steers and the subsequent deposit of the proceeds thereof in the defendant bank, but made no claim therefor until some time thereafter, we conclude that they are now barred from asserting their right to such funds. The judgment dismissing the petition for want of equity is right and it is

AFFIRMED.

GLENN CALLEN, APPELLEE, V. M. L. RAWLINGS ICE COMPANY, APPELLANT.

FILED DECEMBER 18, 1931. No. 27997.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

John J. Ledwith and *H. N. Mattley*, for appellant.

Perry, Van Pelt & Marti, contra.

Heard before ROSE, GOOD, DAY and PAINE, JJ., and LESLIE, District Judge.

PER CURIAM.

This is an action to recover $5,310 in damages for negligence causing the collision of an ice truck with a Whippet automobile on Forty-Eighth street in the city of Lincoln September 18, 1930, and resulting in personal injuries to plaintiff who was at the time a passenger in the Whippet car. The petition charges that the negligent operation of the truck was the cause of the collision and of the resulting injuries. The truck was owned by defendant and was driven by his employee, Orval Mutchie, who, according to the petition, was then engaged in the duties of his employment.

The principal defense was that, when the collision occurred, Mutchie was using the truck for his own pleasure or convenience and was not then performing any duty of his employment or acting in any capacity for his employer.

Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for $2,810. From a judgment therefor defendant appealed.

The controlling question presented by the appeal is the sufficiency of the evidence to sustain a finding that the driver of the truck at the time of the collision was then the employee of defendant and was then engaged in operating the truck in the employer's service. Upon consideration of the evidence in its entirety, the unanimous opinion is that on this and on all other issues the verdict of the jury is sustained by sufficient evidence. With this question thus determined, error prejudicial to defendant has not been found in the record.

AFFIRMED.

ARTHUR O. BUTLER, APPELLEE, V. EPHRIAM W. DIXON ET AL., APPELLANTS.

FILED DECEMBER 18, 1931. No. 28012.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Kennedy, Holland & De Lacy, for appellants.

Frank L. Frost and *Brome, Thomas & McGuire, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

PER CURIAM.

This action was begun in the district court for Douglas county by Arthur O. Butler, plaintiff, against Ephriam W. Dixon, Abraham Cohn, and Thomas E. Hunt, defendants and copartners doing business under the firm name of the Omaha Paper Stock Company, to recover for personal injuries sustained by the plaintiff by reason of the alleged negligence of an employee of the company. The United States Fidelity & Guaranty Company was joined as a party defendant. The jury returned a verdict for $5,000 in favor of the plaintiff. From the judgment rendered thereon, the defendants have appealed.

The plaintiff was engaged as a truck driver for the Storz Brewing Company of Omaha and on March 27, 1929, he drove his truck into an alley to make a delivery. While he was standing at the side of the truck, and engaged in fastening stakes and chains thereon, a team and wagon owned by the defendant company was driven into the alley by an employee. In attempting to pass the truck, the wagon was driven so close thereto that the rear ends of the truck and wagon collided. The record discloses that the driver pulled the team to the left, approximately six feet before it became necessary to do so, to avoid striking a trap door in the alley. The driver of the team failed to look back to observe whether there was sufficient clearance of the truck beside which the plaintiff was standing. And it appears that he failed to stop his

team immediately after the collision. The plaintiff was caught in such position that he was crushed between the wagon and the truck. Both the plaintiff and the driver of the team were familiar with the alley and, under the facts, we think the jury were justified in finding the defendant company's employee guilty of actionable negligence.

The contention of the defendant is that the verdict is excessive. But, in view of the plaintiff's injuries, we do not think so. The evidence fairly shows that the walls of his chest have been thereby weakened; that his right shoulder is lower than his left; and that his general physical strength has been permanently impaired. Plaintiff at the time of the accident was 49 years of age and was earning $30 a week. Since the accident he has resumed work with his former employer, but it appears that it was necessary for him to have assistance in making deliveries.

Complaint is also made in that two jurors in affidavits averred that they had of their own volition visited the scene of the accident. But the affidavits of other jurors are in the record and it does not appear that any of such jurors were in any way influenced in their conclusions by a discussion of the condition of the alley. The alley is only a block from the courthouse and no conflict appears in the evidence in respect of its location, nor does reversible error appear from the fact that the two jurors visited it.

The judgment is

AFFIRMED.

PETER MONFELT ET AL., APPELLANTS, V. WILLIAM T. DAY, APPELLEE.

FILED DECEMBER 31, 1931. No. 27921.

APPEAL from the district court for Gage county: FREDERICK W. MESSMORE, JUDGE. *Affirmed.*

Grant G. Martin and *J. A. McGuire,* for appellants.

Hubka & Hubka, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and WRIGHT, District Judge.

PER CURIAM.

This action was begun in the district court for Gage county by the plaintiffs Peter, George, Arthur, and William Monfelt, and Ada Tryner, heirs-at-law of the estate of Henry Monfelt, deceased, against William T. Day to recover on a promissory note for $2,327.65, executed by Day on November 10, 1923, and delivered to Henry Monfelt.

Plaintiffs allege that Day made a payment of $200 on the note August 15, 1925, and that such payment was indorsed thereon by Henry Monfelt, and that, contrary to the contention of the defendant, this action is therefore not barred by the statute of limitations. The plaintiffs alleged that there was due from the defendant on the note $3,444.42, with interest thereon at the rate of 10 per cent. per annum from October 4, 1929. The jury, however, found against the plaintiffs and in favor of the defendant. The plaintiffs have appealed.

The vital question here for determination is whether the payment of $200 on the note by the defendant to Henry Monfelt, August 15, 1925, was a payment upon the note in suit or upon another indebtedness, as defendant contends.

Sophia Monfelt is a daughter of Henry Monfelt and she testified that she was present, on or about August 15, 1925, when the defendant was alleged to have made and executed his check for $200 to apply on the note in suit. She testified, however, that the defendant left the house before the indorsement was written thereon by her father.

The defendant denied that he ever at any time made a payment on the note. He testified that a $200 check, that is noticed in the record, was in payment of a 15-day loan of money by Monfelt to him, but that no note was ever executed therefor. He also testified that the check in question was written for him by his son in their home,

and not by the daughter of Henry Monfelt, as she testified, and that he, the defendant, delivered the check to Monfelt on the street. And the defendant's son, in the presence of the jury, wrote a copy of a notation on the check and the handwriting appears to be practically identical with that on the check. The record of the bank, in which the defendant kept an account, discloses that only one $200 check was charged against his account at or near the time in question and the date thereon is as of August 14, 1925. And Monfelt's daughter testified that the writing on the check in question was not in her handwriting.

Upon submission, as above noted, a verdict was returned that was adverse to the contention of the plaintiffs. And it is elementary in this jurisdiction that the jury, after hearing and observing the witnesses and their demeanor while testifying, are better qualified to judge of the weight of the evidence than is a reviewing court with only the opposing counsel and the record as guidance.

The judgment is

AFFIRMED.

PETERS TRUST COMPANY, APPELLEE, V. JESSE LEWIS ET AL., APPELLANTS: JOHN F. ROBINSON ET AL., APPELLEES.

FILED JANUARY 8, 1932. No. 28030.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

Simon A. Simon, Edgar B. Zabriskie and *Webb, Kelly & Lewis,* for appellants.

Morsman & Maxwell and *T. B. Dysart, contra.*

Heard before ROSE, GOOD and DAY, JJ., and FROST and MESSMORE, District Judges.

PER CURIAM.

This is a proceeding by mortgagors to set aside a decree foreclosing a mortgage on real estate and to vacate a confirmed judicial sale of the mortgaged premises on the ground that the mortgagee, plaintiff in the foreclosure suit, was not the real party in interest. A defendant herein, to whom the decree of foreclosure had been assigned and by whom the mortgaged real estate had been purchased at the judicial sale, demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained. Mortgagors elected to stand on their petition and the proceeding herein was dismissed. Mortgagors appealed.

The sufficiency of the petition to state a cause of action is the question presented by the appeal. The petition does not state any defense to the mortgage or to the decree of foreclosure or to the judicial sale, unless it is embodied in the plea that the mortgagee, plaintiff in the foreclosure suit, was not the real party in interest. An examination of the petition herein leads to the finding that it fails to state facts sufficient to show that plaintiff in the foreclosure suit did not have authority to maintain the action. The demurrer, therefore, was properly sustained and the proceeding dismissed.

AFFIRMED.

OCCIDENTAL BUILDING & LOAN ASSOCIATION v. LOUIS F. JOHNSON, APPELLANT: H. P. CONKLIN, INTERVENER, APPELLEE.

FILED JANUARY 8, 1932. NO. 28056.

APPEAL from the district court for Scotts Bluff county: EDWARD F. CARTER, JUDGE. *Affirmed.*

Morrow & Morrow, for appellant.

Clarke & Patterson, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and WRIGHT, District Judge.

PER CURIAM.

October 5, 1929, plaintiff began its suit to foreclose a first mortgage made by Johnson and wife against the necessary parties then interested in the land. Decree was duly entered July 23, 1930, awarding a first lien for the sum of $2,286.92, with costs and with interest at 10 per cent. from the date of the decree. Request for the statutory stay of nine months was seasonably made. On September 11, 1930, the intervener obtained leave to file his petition of intervention and did so on September 16, 1930, seeking foreclosure of a mortgage made by the same parties on the same land, for $3,531.80, dated June 3, 1930. Decree was entered October 30, 1930, on default of all defendants, finding due the intervener $3,789.23, with costs and interest, as a second lien on the property. A sale was had January 12, 1931, on this latter decree and the sheriff reported it sold to H. P. Conklin, the intervener, for $2,550. The Johnsons sought to have the sale confirmed on this bid, and Conklin sought to have the bid set aside and the sale vacated on the ground of mistake in the bid reported; and that it was not his true bid. Evidence was taken by the court and the sale was vacated.

The sheriff, now out of office, was the only witness whose testimony was taken as to the bidding. It seems confusing and inconsistent. At least twice the witness

says it was a bid of $2,550 and in different places in his testimony he also says: "He said he wanted to bid $100 above the first lien;" "I understood it (the bid) was $100 over the first lien;" "He mentioned it several times that he wanted to bid $100 over the first lien." He testified that Conklin and his attorney "figured out" that the first lien and $100 would amount to $2,550. "That is why I made the return the way I did, that is what I got."

The trial court, who saw and heard the witness, found that the bidder did not intend to make the bid as returned by the sheriff, and set the sale aside. We think he did not err. The judgment of the district court is

AFFIRMED.

NATIONAL AUTOMOBILE ASSOCIATION, APPELLANT, V. HARRY D. STRUNK, APPELLEE.

FILED JANUARY 13, 1932. No. 28040.

APPEAL from the district court for Red Willow county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Scott & Scott and *Paul I. Manhart* for appellant.

C. D. Ritchie, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and WRIGHT, District Judge.

PER CURIAM.

Action for damages for libel. Defendant, publisher of a newspaper at McCook, demurred to the petition as not stating a cause of action. The demurrer was sustained. Plaintiff appealed.

The article on which the action is based is set out in full in the petition. It indicated that the Chamber of Commerce of McCook was making a drive against those who were obtaining money by false representations of stock they were selling in the community, and that one Daugherty, selling memberships in plaintiff association, "made his clients believe that membership in the association carried benefits not called for in the contract,"

that he had been prosecuted, pleaded guilty, was fined $10 and costs, and ordered to return a membership fee of $9.50 obtained from a subscriber. The main charge of the pleading arose out of the headline which was: "Fake Association Salesman Fined. Omahan Forced to Return Membership Fees to Subscribers." Plaintiff argues that the word "Fake" modifies the word "Association," whereas defendant argues that the text shows the defendant intended the adjective to apply to the salesman. The only place where plaintiff was named in the publication was in a paragraph in these words: "The National Automobile Association was the firm represented by Daugherty. Daugherty, it was claimed by the Chamber of Commerce, made his clients believe that membership in the association carried benefits not called for in the contract." So the crux of the article was that the salesman was a faker, which means a "petty swindler," in that he falsely represented the coverage of plaintiff's contracts. The implication is that the membership contract was not criticized as bad, but that the plaintiff's salesman perpetrated a fake by making the false representations, on which, when duly charged, he had pleaded guilty. As a syllabus of the text, the headline was a bungle, but we are of the opinion that the published article, as set forth in the petition, afforded no sufficient basis for plaintiff's action against defendant, and that the court did not err in sustaining the demurrer. The judgment is

AFFIRMED.

JAMES M. PARROTT, APPELLANT, V. EUSTIS AGRICULTURAL SOCIETY AND CORN SHOW ET AL., APPELLEES.

FILED JANUARY 28, 1932. No. 28076.

APPEAL from the district court for Frontier county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Perry, Van Pelt & Marti and *G. E. Simon*, for appellant.

F. J. Schroeder, contra.

Heard before ROSE, DEAN, GOOD and DAY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This is a suit in equity for an injunction enjoining the Eustis Agricultural Society and Corn Show, claimant, and the county treasurer of Frontier county, from selling or paying a 2,000-dollar county warrant drawn in favor of the society named. A claim for $2,000 was presented to the county commissioners and allowed.

James M. Parrott, a taxpayer, is plaintiff herein. He applied for an injunction on the grounds that claimant was not entitled to the proceeds of a tax levy for a county agricultural society because its constitution, articles and by-laws had never been approved by the state board of agriculture as required by statute, and that published notice of the allowance of the claim was not given in time to permit an appeal from the decision of the county commissioners within the statutory period of ten days. Defendants challenged the sufficiency of plaintiff's alleged grounds for an injunction. Upon a trial of the issues the district court dismissed the suit, and plaintiff appealed.

Upon a trial *de novo* a sufficient ground for the granting of an injunction has not been shown or an error found in the proceedings and judgment of the district court.

AFFIRMED.

MOLLIE SOKOLOF, APPELLANT, V. FIRST NATIONAL BANK, APPELLEE.

FILED JANUARY 28, 1932. No. 28112.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Affirmed.*

H. T. White and *Mathilde J. K. Long*, for appellant.

Ziegler & Dunn and *G. W. Becker, contra.*

Heard before ROSE, DEAN, GOOD and DAY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This is a personal injury action in which defendant had judgment and plaintiff has appealed.

In her petition plaintiff alleged that defendant was the owner and operator of an office building; that, while she was passing through the lobby of the building to the elevator entrance, she slipped, fell and sustained severe injuries; that her fall was "occasioned by the negligence of the defendant and its agents and servants in this that near the entrance of said elevators and within the lobby of said building one of the porters employed by the defendant had spread soap on the floor of said lobby which soap caused said floor to become so slick that plaintiff in the exercise of due care was unable to maintain her footing thereon and fell sustaining the injuries hereinafter set out. That no warning was given to plaintiff that said soap was spread upon the floor and that defendant well knew that said soap so spread upon the floor constituted a dangerous condition and permitted said dangerous condition to exist without warning to any one using said lobby for the purposes for which it was and is maintained." In its answer defendant admitted that it owned and operated the office building and that plaintiff fell and received some injuries, but denied any negligence.

At the conclusion of all the evidence, the trial court, on motion of defendant, discharged the jury and rendered judgment for defendant. The sole question presented by this appeal is whether there was sufficient evidence of negligence by defendant to require the submission of the cause to the jury.

There is no evidence that any servant, or other person acting for or on behalf of defendant, placed, or caused to be placed, any soap on the floor of the lobby; neither is there any evidence from which such fact could be reasonably inferred; nor is there any evidence that, if soap was upon the floor, any officer, agent or employee of defendant had any knowledge thereof until the time of the accident. It follows that there is no evidence from which negligence on the part of defendant could have been found

by the jury. Consequently, there was no occasion to submit the cause to the jury.

On the record presented, no other judgment could have been properly rendered.

AFFIRMED.

BROADWAY BANK OF KANSAS CITY, APPELLEE, V. HARRY SAGER, APPELLANT.

FILED FEBRUARY 5, 1932. No. 27859.

APPEAL from the district court for Sheridan county: EARL L. MEYER, JUDGE. *Affirmed.*

A. C. Plantz, for appellant.

Carlyle W. Edgell, contra.

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and RAPER and RYAN, District Judges.

PER CURIAM.

The Broadway Bank of Kansas City sued to recover $1,000 on a promissory note executed June 24, 1927, by Harry Sager and his wife, Lena H. Sager. The note bears interest at the rate of 8 per cent. per annum until paid. In his answer, Harry Sager alleges that the note sued on is a renewal of two notes for $500 each which were executed by him and payable to the Superior Medicine Company of Kansas City and by that company sold to the plaintiff bank. Sager also alleges that he executed an instrument purporting to be a contract with the Superior Medicine Company for the purchase of 1,000 "Superior Medicine Cabinets," and for which he executed the two $500 notes, but he alleges that the cabinets are now and at all times were a fraud and that he has therefore been unable to sell or to dispose of them. He alleges that the company's agent represented the cabinets to him as a merchantable article greatly in demand and that, in reliance upon the representations so made, he purchased the cabinets. The defendant contends that the bank was not an innocent purchaser of the note in suit and that it was

therefore chargeable with knowledge of the fraud that was perpetrated upon the defendant by the company. The defendant also alleges that he has been damaged in the sum of $1,000 by the purchase of the cabinets so delivered to him by the Superior Medicine Company.

The court found that Lena H. Sager did not sign the notes with the intention of binding her separate estate and the court thereupon dismissed the action as to her. But the court rendered a judgment against Harry Sager, pursuant to the prayer of the plaintiff bank, in the sum of $1,273.33, with interest thereon at 8 per cent. per annum. From the judgment so rendered the defendant Harry Sager has appealed.

The evidence tends to prove that, for a valuable consideration, in the usual course of business and without notice of defect in or defense thereto, plaintiff acquired title to two promissory notes executed by defendant to third parties. Some time after their maturity the defendant renewed the notes by executing the note sued on in this action. If plaintiff was an innocent holder for value of the first notes, then the defense of fraud or want of consideration would not have been available as a defense in an action on the original notes; nor would such a defense be available to him in an action on the renewal note.

In a law action, tried without a jury, the findings of the trial court have the same force and effect as a verdict, and will not be disturbed unless clearly wrong.

From the record it appears that no other finding than that made by the trial court could be sustained.

The record is free from error. The judgment is

AFFIRMED.

LAB BRESLOW, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED FEBRUARY 5, 1932. No. 28120.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Bruce Fullerton and *T. R. P. Stocker,* for appellant.

Flansburg & Lee, Frank A. Peterson, Max Kier, Lloyd E. Chapman and *John O. Sheldahl, contra.*

Heard before GOSS, C. J., DEAN and PAINE, JJ., and CARTER and RHOADES, District Judges.

PER CURIAM.

Plaintiff sued the city of Lincoln and the Iowa-Nebraska Light & Power Company for damages for the alleged conversion of a light and power line. At the conclusion of the evidence for plaintiff the court directed a verdict for defendants. From judgment thereon the plaintiff appeals.

In 1925 plaintiff, conducting his grain elevator a short distance outside the village of College View, made an arrangement with the village to extend its light and power line to his place of business. The evidence, as contained in the minutes of the village board, shows that the village built the line at a cost of $634.12, of which it agreed to absorb $200 and plaintiff agreed to pay and did pay $434.12. The village agreed to refund to the plaintiff this amount as service charges of $25 each were paid by users connecting with the line. It seems that no such users have connected with the line since it was built. In 1928 the village sold its light and power system to defendant light and power company, and in 1929 the village was consolidated with the city of Lincoln. These defendants, having succeeded to the rights and liabilities of the village as of these dates, were therefore made defendants.

The elevator burned about two years after the light line was extended to it. Plaintiff never since has desired light or power. To preserve them, the transformers were removed and stored. They can be replaced and service can be resumed in a few hours if desired by plaintiff or any new customers on the line.

While it seems clear from the minutes of the village that the title to the line when it was built was in the village, yet, assuming plaintiff was to have title until the service charges refunded the $434.12 he paid the village

to install the line, the evidence does not show that the line has been converted or destroyed by defendants. The defendant light and power company stands ready to put it in operation whenever plaintiff or other customers need it, as contemplated by the agreement under which it was built.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. HYMAN ZELEN, APPELLEE, V. BOARD OF CONTROL ET AL., APPELLANTS.

FILED FEBRUARY 5, 1932. No. 28157.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

C. A. Sorensen, Attorney General, L. Ross Newkirk and *Homer L. Kyle,* for appellants.

Mockett & Finkelstein, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and PAINE, JJ.

PER CURIAM.

This is an application by the state on the relation of Hyman Zelen for a peremptory writ of mandamus requiring the members of the state board of control, respondents, to award relator the contract to furnish incandescent lamps for state institutions under their jurisdiction. On competitive bidding conducted pursuant to law, relator offered to sell the lamps at 41 per cent. discount from the list price and the Westinghouse Electric Company made a bid of 29 per cent. discount from the list price. Respondents rejected the lower bid of relator and awarded the contract to his competitor.

The application for mandamus was resisted on the principal grounds that respondents, in calling for bids, reserved the right to reject any and all bids, and that in considering the bids made they exercised a reasonable discretion in rejecting the bid of relator, previous per-

formance of contracts on his part having been unsatisfactory, and his competitor being in the present instance the more responsible bidder.

The trial court heard the evidence on both sides and allowed the writ. Respondents appealed.

An examination of the evidence results in the finding that there was no substantial reason for rejecting relator's bid or for the defense that performance of previous contracts by relator to furnish lamps had been unsatisfactory. There was an abuse of discretion in rejecting the lower bid. The writ was properly allowed.

AFFIRMED.

MERLIN T. PERKINS, APPELLANT, V. JOSEPH S. RATHBUN ET AL., APPELLEES.

FILED FEBRUARY 11, 1932. No. 28106.

APPEAL from the district court for Arthur county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

H. A. Dano, for appellant.

M. M. Maupin, contra.

Heard before ROSE, GOOD and EBERLY, JJ., and BROADY and CHASE, District Judges.

PER CURIAM.

This is an action in ejectment for 3.36 acres of land in section 34, township 17, range 37, Arthur county. Defendants Hood claimed the land, and upon a trial of the issues the district court found that plaintiff did not make a case and directed a verdict in favor of defendants Hood. From a dismissal of the action plaintiff appealed.

Upon a review of the record, error prejudicial to plaintiff has not been found.

AFFIRMED.

ARTHUR F. SCHOENROCK, APPELLEE, V. AMERICAN INDEMNITY ASSOCIATION, APPELLANT.

FILED MARCH 2, 1932. No. 28074.

APPEAL from the district court for Jefferson county: FREDERICK W. MESSMORE, JUDGE. *Affirmed.*

Donelson & Gaughan, for appellant.

Denney & Denny, contra.

Heard before ROSE, DEAN, GOOD and DAY, JJ., and THOMSEN, District Judge.

PER CURIAM.

Plaintiff brought this action in the district court for Jefferson county on a policy of accident insurance. From a judgment in favor of plaintiff defendant has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

STEPHEN B. MILES, APPELLANT, V. OIL WELL SUPPLY COMPANY ET AL., APPELLEES.

FILED MARCH 2, 1932. No. 28078.

APPEAL from the district court for Richardson county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

John C. Mullen and *George N. Foster*, for appellant.

Wiltse & Wiltse and *J. H. Foster, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

PER CURIAM.

Plaintiff brought this action in the district court for Richardson county by which he sought to obtain a new trial of an action entitled Oil Well Supply Company v. Miles on the ground of newly discovered evidence. The trial court found for defendants and plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ELIZABETH F. GRANTHAM ET AL., APPELLANTS, V. CITY OF CHADRON, APPELLEE.

FILED MARCH 2, 1932. No. 28123.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

Allen G. Fisher, Charles A. Fisher and *Samuel L. O'Brien,* for appellants.

G. T. H. Babcock and *J. E. Porter, contra.*

Heard before ROSE, GOOD and EBERLY, JJ., and BROADY and CHASE, District Judges.

PER CURIAM.

Plaintiff brought this action to recover on an alleged contract for arbitration of damages claimed for right of way in the construction and maintenance of a pipe line. Defendant pleaded an ordinance by which the right of way was condemned. The trial court found generally for defendant and sustained the condemnation award. Plaintiffs have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

JOHN ABBEY, APPELLEE, V. CHARLES POTTER ET AL., APPELLANTS.

FILED MARCH 2, 1932. No. 28152.

APPEAL from the district court for Webster county: J. W. JAMES, JUDGE. *Affirmed.*

Bernard McNeny, J. S. Gilham and *L. A. Sprague,* for appellants.

Howard S. Foe, contra.

Heard before ROSE, GOOD and EBERLY, JJ., and CARTER and CHASE, District Judges.

PER CURIAM.

Plaintiff brought this action in the district court for Webster county to recover damages resulting from an automobile collision. From a verdict and judgment in favor of plaintiff defendants have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

JOHN A. WEEMS, APPELLEE, V. JOHN O'HARE, APPELLANT: EDNA M. WEEMS, APPELLEE.

FILED MARCH 11, 1932. No. 28202.

APPEAL from the district court for Nance county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

Joseph E. Daly and *Joseph R. Shields*, for appellant.

Kemp & Brower, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

PER CURIAM.

The defendant, John O'Hare, appeals from a decree of foreclosure of one mortgage on 800 acres, found to be a first lien in favor of plaintiff, and of another mortgage on the same land in favor of defendant Edna M. Weems, found to be a second lien. Annie O'Hare, wife of John O'Hare, was also a defendant, but the decree absolved her from personal liability on the notes. The answer of the O'Hares and their brief are long and involve many facts which we find not necessary to discuss in detail. They allege that there was no consideration for the notes and mortgages; that plaintiff, to whom they made the second mortgage and notes, and who is the father of Edna M.

Weems, never transferred them to her; that plaintiff by fraud induced O'Hare to purchase from plaintiff 320 acres of other described land at a fraudulently inflated valuation, taking advantage, as an experienced man of shrewd and calculating qualities, of the timid temperament and easy disposition of O'Hare; that then, having confidence in plaintiff, they were fraudulently induced to enter into other contracts with him, to deliver to him securities of value, to sign papers and to pay him money, and the like, the whole recital of which would serve no useful purpose. They prayed for an accounting and for judgment thereon for the amount found due them, for cancelation of notes, mortgages and deeds, and for a decree quieting their title.

An examination of the evidence shows that the allegations of fraud against the plaintiff were not supported by the proofs, and that the mortgagees were entitled to the amounts found due on their respective mortgages. The real source of the trouble appears to be located in the deflation of the market value of real estate beginning about 1920. Mr. O'Hare was familiar with all the land involved, apparently knew what he was doing in the dealings between the parties, and, evidently with knowledge of the facts upon which he now seeks to establish fraud, by his conduct for years up to a time comparatively short before the bringing of this suit, ratified those acts. At least, he has failed to sustain his burden of proving the fraud, misrepresentation and deceit alleged by him as a defense. The district court, with the opportunity to observe the witnesses, reached this conclusion, which is confirmed by our examination of the record. The judgment of the district court is

AFFIRMED.

HARRY EBSEN ET AL. V. STATE OF NEBRASKA.

FILED MARCH 25, 1932. No. 28211.

ERROR to the district court for Webster county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

L. A. Sprague, Edward P. Prince, Bernard McNeny and *C. A. Smedol,* for plaintiffs in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

Heard before GOSS, C. J., DEAN, GOOD, DAY and PAINE, JJ., and LANDIS, District Judge.

PER CURIAM.

The defendants were convicted of bank robbery and were sentenced to the penitentiary for a period of 20 years. Counsel representing plaintiffs in error here did not represent them below.

The errors of law assigned relate to two points: First, handcuffing of the prisoners; second, misconduct of the county attorney.

After the jury were impaneled, just before the attorneys made their opening statements, counsel for defendants requested the court to direct the sheriff to remove the handcuffs from the defendants. The court remarked that the defendants were in the custody of the sheriff and that he was the best judge of whether to keep the handcuffs on or not. Counsel noted an exception to the court referring the matter of his request to the sheriff. Defendants' present counsel argue strongly about the matter here. But, while they allege the fact in the motion for new trial, they do not point out in the record any evidence to indicate that the sheriff did not comply with the request to remove the handcuffs. Even if to leave the handcuffs on the defendants would have been prejudicial, we cannot assume they were so left, and that prejudicial error was therefore committed.

On cross-examination of an alibi witness for Harry Ebsen, the county attorney asked him an improper question. Counsel for Ebsen objected and stated that, "if the county attorney continues this line of cross-examination, we ask for a mistrial." The court sustained the objection and announced that line of questions would no longer be permitted. Defendants did not ask for a mistrial, the county

attorney did not continue that line and it is not shown that the defendants were prejudiced.

The judgment of the district court is

AFFIRMED.

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7. Where an absolute divorce is denied, equity may grant a divorce to the wife *a mensa et thoro* and award her separate maintenance. *Forburger v. Forburger* 705
8. Separate maintenance to the wife should bear an equitable proportion to the husband's income. *Forburyer v. Forburger* 705
9. Permanent alimony is founded upon the wife's right to such support from her husband as she would be reasonably entitled to expect, considering all the circumstances; its amount resting upon the sound discretion of the court. *Swolec v. Swolec* 837
10. Factors determining amount of alimony, stated. *Swolec v. Swolec* 837

Drains.

1. Written notice of claim for damages arising out of negligent construction or maintenance of a drainage ditch *held* a condition precedent to an action therefor. *Bartels v. Drainage District* 340
2. Petition in an action for damages resulting from negligent construction or maintenance of a drainage ditch, which does not allege filing of statutory notice, *held* not to state a cause of action. *Bartels v. Drainage District* 340

Easements.

1. Landowners, through adverse construction and use of a drainage ditch into an irrigation canal for the statutory period, may acquire an easement from the irriga-

tion district. *Central Irrigation District v. Gering Irrigation District* 199
2. The owner of a drainage ditch used continuously for ten years acquires an easement for drainage purposes. *Bures v. Stephens* 751

Equity.

1. Where a court of equity has obtained jurisdiction of a cause, it will retain it and determine all rights of the parties. *Johnson v. Weskamp* 381
2. Public policy may require relaxation of a rule founded on public policy. *Citizens Nat. Bank v. Polski* 658
3. Where equity assumes to act, it must do complete justice, regardless of whether litigants came into court with unclean hands. *Citizens Nat. Bank v. Polski* 658
4. Where it does not violate a right or agreement nor work injustice, a court of equity may issue a writ of assistance to give effect to a decree. *Metropolitan Life Ins. Co. v. Heany* 747
5. Equity may, in exercise of inherent powers, refuse relief sought after undue and unexplained delay, and when injustice would result. *Severson v. McKenzie* 827
6. Equity has inherent power to refuse relief after undue and inexcusable delay independent of the statute of limitations. *Severson v. McKenzie* 827

Evidence.

1. In an action for damages from collision of automobile with a mower on a highway, state rules and regulations applicable to vehicles on highways *held* admissible. *Trussell v. Ferguson* 82
2. The owner of personalty is qualified to testify as to its value. *Folken v. Union P. R. Co* 193
3. Opinion of counsel of experience respecting title may be considered by the court in determining marketability of title. *Robinson v. Bressler* 461
4. The grantee may deny by parol evidence a recital in his deed that he assumed and agreed to pay certain mortgages. *Shamburg v. Mathiesen* 517
5. Only acts and declarations of a conspirator done and made while the conspiracy is pending, and in furtherance of its object, are admissible against his associates. *Nebraska State Bank v. Citizens State Bank* 522
6. Generally, a presumption is not evidence, but a mere rule of law, and disappears when evidence on the subject is given. *Auld v. Auld* 576
7. A qualified expert may give his opinion as to the speed of an automobile, based on the length of skid marks

made when brakes were applied. *McKinney v. Winterstеen* 679
8. A "presumption" is an inference which may be drawn from a particular fact, unless and until the truth of such inference is disproved. *Smith v. Fall* 783
9. A presumption cannot be indulged in where a particular fact upon which the presumption is based is not shown to exist. *Smith v. Fall* 783
10. The consideration named in a written contract, if merely a recitation of fact, can be varied by parol evidence. *Hartman v. Lipovsky* 823
11. Acknowledgment of receipt of consideration in a written contract *held* a recitation of fact which may be explained or contradicted by parol evidence. *Hartman v. Lipovsky* 823

Execution.

1. A judgment creditor's right to an execution can be taken away only by legal proceeding. *Barry v. Horton* 20
2. Where no goods or chattels subject to execution can be found, the officer must indorse the writ "no goods," and forthwith levy on lands and tenements and sell same subject to prior liens. *Barry v. Horton* 20
3. A motion to confirm an execution sale of lands is properly overruled, where the lands were not sold subject to prior liens. *Barry v. Horton* 20
4. Where a judgment debtor is insolvent, the issuance of execution and a return *nulla bona* are not conditions precedent to other proceedings to satisfy the judgment. *State, ex rel. Sorensen, v. Bank of Crab Orchard* 210

Executors and Administrators.

Where executor was charged with value of property of another estate, less lawful deductions, he was properly discharged, where deductions exceeded value of property. *In re Estate of Freling* 247

Exemptions.

1. Exemption laws will be liberally construed. *State, ex rel. Sorensen, v. Bank of Crab Orchard* 210
2. Dividends from insolvent state bank due judgment debtor *held* exempt. *State, ex rel. Sorensen, v. Bank of Crab Orchard* 210

Fixtures.

1. A boiler installed by tenant to furnish steam for cleaning and pressing business *held* to be a trade fixture. *Rothery v. Dohrse* 259

2. That a boiler installed by tenant to furnish steam for cleaning business is also used for heating *held* not to make it realty. *Rothery v. Dohrse* 259
3. A tenant who installed a boiler in a cleaning plant *held* entitled to remove it at end of his term, though its removal necessitated removal and replacing of a small portion of a brick wall. *Rothery v. Dohrse* 259

Fraud.

1. In an action for fraud, evidence *held* to sustain judgment for defendant. *Johnson v. Hastings & Heyden* 610
2. A petition, to state a cause of action for fraud or conspiracy to defraud, must allege, not only conspiracy and fraudulent acts, but also facts showing damage. *Reed v. Occidental Bldg. & Loan Ass'n* 817

Fraudulent Conveyances.

1. Evidence *held* to sustain finding that deed was made in fraud of creditors. *Clermont Cravat Co. v. Eckhard* 416
2. In a suit to set aside conveyances as fraudulent, evidence *held* to sustain findings for defendants. *Cary v. Reiter* 476

Gifts.

1. Gift by father to son to the exclusion of other children *held* invalid. *Holtman v. Lallman* 183
2. Facts proved *held* to establish presumption of undue influence, and to put burden on donee of gift to overcome such presumption by clear and satisfactory evidence. *Wixson v. Nebraska Conference Ass'n* 771

Highways.

In an action against a county for injuries due to negligence in maintaining a highway, evidence of a similar accident *held* admissible on the question of notice. *Cromwell v. Fillmore County* 114

Homestead.

1. The fact that a husband conveyed to his wife property on which the family had resided for 20 years does not constitute an abandonment of its homestead character. *Berggren v. Bliss* 801
2. A person cannot at the same time have two homesteads, nor can he have two places, either of which he may elect to claim as homestead. *Berggren v. Bliss* 801

Husband and Wife.

Liability of wife for necessaries is not a personal liability, and where no property exists at time of contracting

debt, no liability can arise against the wife. *Dreamer v. Oberlander* 335

Indictment and Information.

1. An information charging offense of abandonment substantially in language of statute is sufficient. *Weber v. State* 369
2. An indictment should contain a plain and concise statement of the charge against accused. *Kirchman v. State* 624
3. An information verified on information and belief *held* sufficient. *Foreman v. State* 619

Infants.

1. A child six years of age *held* not possessed of sufficient discretion to be guilty of contributory negligence. *McKinney v. Wintersteen* 679
2. A seven year old child is not chargeable with contributory negligence. *Siedlik v. Schneider* 763

Injunction.

1. The purpose of a temporary restraining order is to impose judicial restraint until litigants can be heard on application for a temporary injunction. *Meeske v. Baumann* 786
2. In an action on a bond for a preliminary restraining order wrongfully granted, obligees may recover expenses incurred in procuring dissolution of the order, including reasonable counsel fees. *Meeske v. Baumann* 786
3. In an action on a bond for a preliminary restraining order wrongfully granted, and dissolved, obligees need not allege payment of reasonable counsel fees. *Meeske v. Baumann* 786

Insane Persons.

1. An application for the appointment of a guardian for an incompetent is a special proceeding, and not adversary in character. *Hall v. Hall* 228
2. An alleged incompetent seeking to set aside a decree appointing a guardian for his estate need not prove participation by petitioners in alleged fraud. *Hall v. Hall* 228
3. Alleged incompetent *held* entitled to have decree appointing guardian for his estate set aside for constructive fraud. *Hall v. Hall* 228

Insurance.

1. Insurance agent's promise to insured to renew policies *held* not binding on insurer. *Dohlin v. Dwelling House*

Mutual Ins. Co. 47
2. Insurance Code *held* to adopt the New York standard form of fire insurance policy, as existing and construed, except as modified by the Nebraska Code. *Mayfield v. North River Ins. Co.* 63
3. Insured's violation of conditions or breach of warranty under a location clause *held* not to invalidate the policy, unless it contributed to the loss. *Mayfield v. North River Ins. Co.* 63
4. Provision in Insurance Code relating to misrepresentation or warranty becomes a part of an insurance policy. *Mayfield v. North River Ins. Co.* 63
5. An assignment of a fire insurance policy after loss transfers assignor's rights to proceeds. *Newman v. National Union Fire Ins. Co.* 94
6. Where a junior mortgagee has an insurable interest in property at time of loss, insurer, by making an indorsement on policy recognizing his title, cannot thereafter assert that liability was extinguished. *Newman v. National Union Fire Ins. Co.* 94
7. Breach of conditions in fire policy relating to other insurance and to notice of foreclosure proceedings *held* not to preclude recovery, unless the breach contributed to loss. *Newman v. National Union Fire Ins. Co.* 94
8. Six months' limitation after expiration of fidelity bond for giving notice of claim *held* referable only to classification stated in condition of which it is a part, where inconsistent with other conditions. *Queen Incubator Co. v. National Surety Co.* 224
9. A fidelity bond will be most strongly construed against the insurer. *Queen Incubator Co. v. National Surety Co.* 224
10. Evidence *held* to establish that insurer, by its conduct, waived the right to strict enforcement of forfeiture provisions of an extension premium note. *Higgins v. Old Line Ins. Co.* 254
11. A provision in premium note for forfeiture of policy upon default in payment, being for insurer's benefit, may be waived. *Higgins v. Old Line Ins. Co.* 254
12. Judgment for beneficiary, on theory that insurer by accepting premium note waved cash payment, *held* sustained by evidence. *Shurtleff v. Bankers Nat. Life Ins. Co.* 306
13. Answer to question in application for insurance *held* a warranty material to the risk, voiding the policy. *Morrissey v. Travelers Protective Ass'n* 329
14. A fraternal beneficiary association *held* not estopped to

deny liability under its certificate, though the soliciting member knew of false statements material to the risk in the application. *Morrissey v. Travelers Protective Ass'n* 329
15. The general rule which imputes knowledge of an agent to his principal *held* not to apply to a soliciting member of a fraternal beneficiary association. *Morrissey v. Travelers Protective Ass'n*..... 329
16. A chattel mortgagee who procured a fire insurance policy without the mortgagor's knowledge *held* entitled, under mortgage clause, to recover loss in his own name. *State Credit Co. v. National Old Line Life Ins. Co*..... 345
17. Evidence *held* to support judgment for defendant based on provision in insurance policy relating to insured's ownership of realty. *Black v. National Union Fire Ins. Co.* 377
18. When an insurance company having timely notice of loss is sued and denies liability, it waives proof of loss. *Ericson v. Mutual Benefit Health & Accident Co*..... 580
19. Provisions of insurance policies prepared by insurer will be construed most strongly against the insurer. *Woodring v. Commercial Casualty Ins. Co*..... 734
20. A salesman driving his employer's automobile as an incident to his employment in selling and delivering merchandise *held* not a "hired operator," within an exception to liability in an automobile insurance policy. *Woodring v. Commercial Casualty Ins. Co*..... 734

Intoxicating Liquors.

1. Finding liquor on premises of wife creates presumption of her unlawful possession. *Stumpff v. State*..... 49
2. Evidence showing only possession incidental to transportation *held* not to sustain conviction of possession. *Wells v. State*..... 178
3. Evidence *held* to sustain conviction for bootlegging. *Ball v. State*..... 690
4. Under an information charging bootlegging, evidence of intent to sell or dispose of intoxicating liquor kept or carried *held* essential to conviction. *Lentz v. State*.... 693

Judgment.

1. Decree in partition held conclusive, though erroneous. *Schleuning v. Tatro*..... 3
2. The rule of *res judicata* is applicable only where it appears that the same facts were or might have been litigated in a former action. *Omaha Road Equipment Co. v. Thurston County*..... 35
3. The rule of *res judicata* is inapplicable where the court

in a former action determined that it was without jurisdiction. *Omaha Road Equipment Co. v. Thurston County* 35
4. The district court during the same term, on its own motion, may set aside a verdict, and enter judgment for the adverse party. *First Nat. Bank v. Broyles* 414
5. A prior judgment on a different cause of action is, in a subsequent action, *res judicata* only as to matters in issue in the former action. *Williams v. Nutter* 458
6. A judgment debtor consenting to continuance for more than three terms in county court cannot in a collateral proceeding enjoin enforcement of county court judgment as void on account of such continuance. *Staben v. Mehrens* 683
7. Petition in suit to enjoin enforcement of a judgment must allege a meritorious defense to the first cause of action. *Staben v. Mehrens* 683
8. Assignment of judgment *held* an assignment for collection only, and not a sale thereof. *Reed v. Occidental Bldg. & Loan Ass'n* 817
9. Where it appears on the face of the petition that a judgment sued on has become dormant, and has not been revived, the petition fails to state a cause of action. *Reed v. Occidental Bldg. & Loan Ass'n* 817

Judicial Sales.

A judicial sale of land will not be set aside for inadequacy of price, unless it is so gross as to show fraud or mistake. *Metropolitan Life Ins. Co. v. Heany* 747
Federal Land Bank v. Radke 834

Jury.

Denial of jury trial in suit to quiet title *held* proper. *Sittler v. Wittstruck* 452

Landlord and Tenant.

1. Generally, a yearly lease of farm lands begins on March 1 and ends on February 28 of the succeeding year, and rental becomes due at expiration of term. *Holtman v. Lallman* 183
2. Where a life tenant died before expiration of yearly lease, the owner of the fee, who was the tenant, *held* not liable for the year's rental, in absence of proof of rental value up to time of tenant's death. *Holtman v. Lallman* 183
3. Evidence *held* insufficient to establish that son paid rent to father by supporting him. *Holtman v. Lallman* 183
4. Employee of tenant, suing for injury, *held* not contrib-

utorily negligent in using a defective stairway. *Tempel v. Proffitt* 249
5. Interest on annual rental begins at the end of the rental year when the rent is due. *Mast v. Murray* 284

Larceny.

Information charging stealing of cow need not state value of cow. *Cochran v. State* 79

Libel and Slander.

1. Spoken words are actionable *per se* if they impute commission of a crime punishable by imprisonment in the penitentiary. *Cline v. Holdrege* 151
2. Words actionable *per se* are not privileged, unless the person uttering them believes them to be true and has reasonable grounds for such belief. *Cline v. Holdrege* 151
3. A newspaper cannot avoid responsibility in a libel suit by proving that a reporter, by mistake, used the wrong person's name. *Walker v. Bee-News Publishing Co* 511
4. In an action for libel, the law looks at the consequences of the publication, and not at the intention of the publisher, who may be held to answer for negligent wrongs, as well as those that are intentional. *Walker v. Bee-News Publishing Co* 511
5. Words are libelous *per se* when they charge a criminal offense involving moral turpitude. *Walker v. Bee-News Publishing Co* 511
6. To state in error that a wrestling match was held in one's barn does not constitute libel *per se*. *Walker v. Bee-News Publishing Co* 511
7. An article stating that two boys had a wrestling match in plaintiff's barn *held* not libelous *per se*. *Walker v. Bee-News Publishing Co* 511

Liens.

1. A lien is a proprietary interest, a qualified ownership; and actually can only be created by owner of property. *General Motors Acceptance Corporation v. Sutherland* 720
2. All liens are created by law or by contract made with the owner of the property. *General Motors Acceptance Corporation v. Sutherland* 720

Limitation of Actions.

The statute of limitations is applicable to claims against counties. *Bryant v. Cedar County* 853

Mandamus.

1. To warrant mandamus against an officer, there must be a clear, existing duty imposed by law. *State, ex rel.*

Long, v. Barstler 167
2. Mandamus will not lie to compel a county clerk to levy a tax certified to him after he has completed the tax list and delivered it to the county treasurer. *State, ex rel. Long, v. Barstler* 167
3. Mandamus will issue against a public officer to compel performance of a clear, existing duty imposed by law. *State, ex rel. Herbert, v. Anderson* 738

Marriage.
1. To constitute a valid marriage, the parties must obtain a license to marry, and the marriage must be solemnized by a person authorized to solemnize marriages. *Walden v. Walden* 804
Collins v. Hoag & Rollins 805
2. Chapter 40, Laws 1923, making a license and solemnization as therein provided requisites of a valid marriage, *held* constitutional. *Collins v. Hoag & Rollins* 805

Master and Servant.
1. Employee *held* to assume risk of injury from lifting. *Chappell v. Chicago & N. W. R. Co.* 28
2. Employer *held* not liable for injury to employee while on his way to work. *Siedlik v. Swift & Co.* 99
3. Injury to employee from stepping into hole on way to work *held* not to arise "in the course of employment." *Siedlik v. Swift & Co.* 99
4. Where employee, instructed by manager to deliver ice, and to use truck to go home for dinner, was injured when returning the truck, *held* that injury arose "out of and in the course of employment." *Mutchie v. M. L. Rawlings Ice Co.* 297
5. Where injured employee had worked on a weekly salary basis and less than one month prior to injuries was changed to an hourly basis, his earnings during as much of the preceding six months as he worked in the same character of employment constitutes the basis for determining weekly wage. *Mutchie v. M. L. Rawlings Ice Co.* 297
6. Evidence *held* insufficient to establish oral agreement for a bonus to salesman. *Ellis v. Omaha Cold Storage Co.* 567
7. In a proceeding under the workmen's compensation law, the parties are entitled to a final and complete disposition of the cause. *G. A. Steinheimer Co. v. Podkovich* 710
8. In a common-law action for damages for lead poisoning, an instruction on assumption of risk approved. *Grover v. Aaron Ferer & Sons* 755

Monopolies.

Petition in action for damages for restraint of trade under antitrust laws *held* insufficient. *Ploog v. Roberts Dairy Co* 540

Mortgages.

1. One objecting to confirmation of a foreclosure sale for inadequacy of price has the burden to show affirmatively that the judgment confirming the sale is erroneous. *Occidental Building & Loan Ass'n v. Beal* 40
2. Legatees who received a note and mortgage from an executor on final settlement of an estate are proper parties to maintain a foreclosure suit. *Darling v. Darling* 153
3. Where a deed is given to secure an indebtedness owing to the grantee, the legal title passes to the grantee. *Northwestern State Bank v. Hanks* 262
4. Where a deed is given to secure an indebtedness owing to the grantee, equity will regard the grantor as retaining an interest in the premises. *Northwestern State Bank v. Hanks* 262
5. Where a deed was given, and simultaneously a lease was executed giving the grantor an option to repurchase within a year, the grantor's interest is the right to pay the debt within the time limited and receive a reconveyance. *Northwestern State Bank v. Hanks* 262
6. Where a deed was given, and simultaneously a lease was executed giving the grantor an option to repurchase within a year, upon failure to repurchase, equity may decree a strict foreclosure and allow a reasonable time for redemption. *Northwestern State Bank v. Hanks* 262
7. Limiting the time to three days to redeem from a strict foreclosure *held* an abuse of discretion. *Northwestern State Bank v. Hanks* 262
8. Evidence *held* to sustain finding as to priorities of mortgages filed for record at the same time. *Judkins-Davies v. Skochdopole* 374
9. Evidence *held* to sustain decree striking mortgage assumption clause from deed as having been placed there by mistake. *Shamburg v. Mathiesen* 517
10. A mortgagee is not put on inquiry with reference to anything he would not have learned through inquiry from a third person in possession. *Kellogg v. McDonald* 613
11. Mere inadequacy of price will not preclude a confirmation of a foreclosure sale, unless the inadequacy is so great as to evidence fraud. *Lemere v. White* 676

12. There are no restrictions upon the means by which the court may determine whether a fair price was obtained at a foreclosure sale, or whether a subsequent sale would realize a greater amount. *Federal Land Bank v. Radke* 834

Municipal Corporations.

1. Statutory procedure for ordering street improvements in cities of the second class and villages is mandatory and jurisdictional. *Musser v. Village of Rushville*..... 128
2. No valid assessment against property for street improvement can be made, unless the governing board of the municipality acts in accordance with statutory procedure. *Musser v. Village of Rushville*..... 128
3. A defective billboard erected on a building *held* not "a defect in a street or sidewalk" within statute requiring notice to city as condition precedent to liability. *Gilbert v. Welch Restaurant Co*..... 312
4. City of metropolitan class *held* liable to person injured when a defective billboard fell from building, where the city officials could have discovered the defective condition. *Gilbert v. Welch Restaurant Co*..... 312
5. Under the charter, bond issue by city of Omaha for acquisition of land for airport *held* not limited to $50,000. *Bruett v. City of Omaha*..... 779
6. Amendment to Omaha city charter, authorizing bond issue for acquisition and improvement of aviation field, *held* not repugnant to general charter provision. *Bruett v. City of Omaha*..... 779
7. Power given to a city to sue and defend implies power to employ counsel for those purposes. *Meeske v. Baumann* 786
8. A city may employ special counsel when the city attorney is absent, ill, or disqualified. *Meeske v. Baumann* 786
9. Where city attorney is ill, absent, or disqualified, defense in suit pending against city *held* not "duty devolving upon regular city officer" within statute relating to compensation. *Meeske v. Baumann*..... 786
10. Where a salaried city attorney is ill or disqualified, a city may employ special counsel to dissolve a preliminary restraining order against purchase of lighting plant equipment and may incur liability for reasonable counsel fees. *Meeske v. Baumann*..... 786

Negligence.

1. In an action for negligence, plaintiff cannot recover where the evidence shows that he brought the injuries on himself. *Casey v. Chicago, B. & Q. R. Co*..... 11

2. Whether an automobile driver was guilty of more than slight negligence in failing to see an unlighted truck on a highway on a dark misty night *held* a question of fact. *Giles v. Welsh* 164
3. Where the jury may infer that defendant was negligent and that plaintiff was contributorily negligent, an instruction on comparative negligence should be given. *Tempel v. Proffitt* 249
4. Defendant must plead and prove contributory negligence of plaintiff. *Tempel v. Proffitt* 249
5. In an action for injuries to pedestrian by an automobile, negligence and contributory negligence *held* questions for the jury under the comparative negligence statute. *Lustgarten v. Harris* 663
6. The owner of a building is not an insurer against accident to an invitee leaving the building by steps provided for that purpose. *Thompson v. Young Men's Christian Ass'n* 843
7. The owner of a building must exercise reasonable care to keep steps leading from the building reasonably safe for use of invitee. *Thompson v. Young Men's Christian Ass'n* 843
8. The fact that an invitee falls on steps leading from exit of building does not raise presumption of negligence against the owner. *Thompson v. Young Men's Christian Ass'n* 843
9. Facts constituting negligence must be proved and not left to inference. *Thompson v. Young Men's Christian Ass'n* 843
10. Burden is on invitee, suing for personal injury sustained by fall on steps of building, to establish that alleged dangerous condition of steps existed and was known or should have been known to the owner before the accident. *Thompson v. Young Men's Christian Ass'n* 843
11. An invitee assumes open and obvious dangers on premises which can be seen and avoided by the exercise of ordinary care. *Thompson v. Young Men's Christian Ass'n* 843

New Trial.

1. Generally, testimony of jurors will not be considered to impeach their verdict in respect of matters essentially inhering in the verdict and resting alone in the breasts of the jurors. *Glick v. Poska* 102
2. Requiring a remittitur, where there was a controverted issue of fact, and the jury's findings warrant amount of recovery, *held* error. *Loy v. Storz Electric Refrigeration Co* 357

Officers.

The law presumes that a public officer faithfully performed official duty. *Meeske v. Baumann* 786

Parent and Child.

Evidence *held* insufficient to sustain conviction of abandonment. *Weber v. State* 369

Partition.

A *bona fide* purchaser under a decree of partition will be protected, though the decree is thereafter reversed. *Schleuning v. Tatro* 3

Payment.

1. Mortgagor *held* estopped to deny application of payments on chattel mortgage instead of real estate mortgage. *Tresnak v. Paulsen* 71
2. Where a note was renewed in reduced amount, the maker cannot maintain that payments were applied contrary to directions. *Tresnak v. Paulsen* 71

Pleading.

1. An order allowing an amendment of pleading, not changing the issues nor affecting the *quantum* of proof, *held* proper. *Folken v. Union P. R. Co* 193
2. Permitting amendment of petition to conform to proof of damages *held* proper. *Folken v. Union P. R. Co* 193
3. A denial of the very words of the allegations of the petition, without denying their substance and effect, tenders no issue. *Bliss v. Pathfinder Irrigation District* 203
4. An answer denying that a bank "is a corporation duly organized and existing under" state laws is insufficient to put in issue its corporate capacity. *Bliss v. Pathfinder Irrigation District* 203
5. Demurrer for "misjoinder of parties" is not equivalent to demurrer for "defect of parties." *Salisbury v. Berry Motor Co* 605
6. In an action for fraud, the petition must set forth facts showing fraud. *U. S. Theatre Supply Co. v. Creal* 743
7. A demurrer to a pleading admits the truth of facts well pleaded, but does not admit the correctness of conclusions of law drawn by the pleader. *U. S. Theatre Supply Co. v. Creal* 743
8. A petition challenged by demurrer charges what by reasonable and fair intendment may be implied from the facts stated. *Meeske v. Baumann* 786

Principal and Agent.

Where a confidential agent undertakes to invest the prin-

cipal's funds in first mortgage loans, and takes a mortgage to himself and a junior mortgage to the principal, equity will subordinate the agent's lien to that of the principal. *Lake v. Rose* 294

Railroads.

1. An automobile driver approaching a railway crossing where there is restricted vision is required to look and listen. *McQuin v. Missouri P. R. Corporation* 423
2. Contributory negligence *held* question for jury. *McQuin v. Missouri P. R. Corporation* 423
3. Statutes requiring locomotives to give designated signals at crossings *held* to apply to roads in fact used by the public, though not dedicated. *McQuin v. Missouri P. R. Corporation* 423
4. Evidence *held* to establish that road crossed by railroad at place where collision occurred was a road in fact used by the public, requiring train to give statutory signals. *McQuin v. Missouri P. R. Corporation* 423
5. In an action for death at a railroad crossing, negligence and contributory negligence *held* questions for the jury. *McQuin v. Missouri P. R. Corporation* 423
6. In absence of statutory regulation, failure of a railroad company to have a flagman at a crossing will not warrant a finding of negligence. *McQuin v. Missouri P. R. Corporation* 423
7. In an action for death, instruction submitting issue of negligence based on failure of defendant railroad company to have a flagman at a crossing *held* error. *McQuin v. Missouri P. R. Corporation* 423

Rape.

1. In an action for damages for rape, whether plaintiff resisted to the extent of her physical ability *held* question for jury. *Ellig v. Powell* 270
2. In an action for damages for rape, no corroboration of the plaintiff's testimony is necessary. *Ellig v. Powell* 270
3. Damages of $1,250 for rape *held* not excessive. *Ellig v. Powell* 270

Receivers.

A petition positively verified by oath of plaintiff may be considered with supporting affidavits on the hearing of a preliminary motion for appointment of a receiver for a corporation. *Howell v. Poff* 793

Replevin.

1. In replevin, where defendant's right to possession of a truck is based on a lien for repairs, the measure of

damages is the value of the right to possession. *Jackson v. Arndt-Snyder Motor Co*..... 276
2. In replevin, a judgment in favor of plaintiff, who had a lien for repairs, for a return of the truck or its value, instead of the value of defendant's possession, *held* erroneous. *Jackson v. Arndt-Snyder Motor Co*..... 276

Robbery.
1. The offense of robbery from the person may be established by testimony of one credible witness. *Cherpinsky v. State*..... 52
2. To constitute robbery from the person, it is not essential that money or property be actually taken from the person. *Cherpinsky v. State*..... 52

Sales.
1. In action for price of potato picker, evidence *held* to sustain finding for plaintiff. *Linn v. Marshall*..... 252
2. The measure of damages for seller's breach of agreement to sell personalty is the market price on day and place appointed for delivery, less unpaid purchase price. *Loy v. Storz Electric Refrigeration Co*..... 357
3. Vendor's signature to affidavit attached to conditional sale contract need not appear at the end of the affidavit. *General Motors Acceptance Corporation v. Sutherland*.... 720
4. A conditional sale contract may be received in evidence, though the vendor's signature appears only in the body of the attached affidavit, and the seal of the notary is omitted. *General Motors Acceptance Corporation v. Sutherland* 720
5. Provision of conditional sale contract covering automobile requiring vendee to keep property free of liens *held* to negative existence of implied authority in vendee to have repairs made. *General Motors Acceptance Corporation v. Sutherland*..... 720

Schools and School Districts.
1. The state superintendent will not be required by mandamus to recognize a school district as a public school district entitled to share state trust funds created for secular public school purposes, if the only school in the district is sectarian, though organized and certified as a public school district. *State, ex rel. Public School District, v. Taylor*..... 454
2. The word "sectarian," in the constitutional provision respecting educational trust funds, applies to the Catholic church, without any distinction between the original church and later denominations of the Christian religion. *State, ex rel. Public School District, v. Taylor* 454

Statutes.

1. Penal statutes must be strictly construed. *Weber v. State* 369
2. Where the language of a statute is plain and unambiguous, there is no room for construction. *State, ex rel. Sorensen, v. First State Bank of Alliance* 502
3. A grant of official power necessarily implied from a specific provision of statute is part of the legislative act. *Meeske v. Baumann* 786

Taxation.

1. The net income derivable from real estate, prudently used for the purpose for which best adapted, is a proper factor to consider in determining its actual value. *Schmidt v. Saline County* 56
2. Tangible property should be assessed at its actual value. *Schmidt v. Saline County* 56
3. All tangible property should be assessed at the same proportion of actual value. *Schmidt v. Saline County* 56
4. A power plant constructed along the line between two school districts *held* within one for purpose of taxation. *School District No. 142 v. School District No. 13* 132
5. Masonic temple and lots on which temple is situated *held* exempt from taxation as property used exclusively for religious, charitable, and educational purposes. *Ancient and Accepted Scottish Rite v. Board of County Commissioners* 586
6. Continuing to assess a tract of land, from which a part was sold, as one entire tract, *held* not to render the entire tax void. *Haarmann Vinegar & Pickle Co. v. Douglas County* 643
7. Payment of taxes *held* voluntary. *Haarmann Vinegar & Pickle Co. v. Douglas County* 643
8. Taxes irregularly assessed, but not entirely void, may not be recovered when voluntarily paid. *Haarmann Vinegar & Pickle Co. v. Douglas County* 643
9. Taxes levied and computed on an amount in excess of actual assessed valuation are absolutely void so far as based on excess value. *Haarmann Vinegar & Pickle Co. v. Douglas County* 643
10. A void tax, though voluntarily paid, may be recovered. *Haarmann Vinegar & Pickle Co. v. Douglas County* 643
11. Where parties in good faith have settled a will contest and have stipulated for a decree accordingly, inheritance tax should be computed upon the portion received by each beneficiary. *In re Estate of Kierstead* 694
12. Evidence disclosing the effect of a will contest on the

property of the estate *held* admissible as bearing on the question as to whether a stipulation settling the will contest was entered into without intention to evade the inheritance tax. *In re Estate of Kierstead* 694

Tenancy in Common.

1. Generally, possession of realty by one cotenant is the possession of all. *Severson v. McKenzie* 827
2. Before ouster of a cotenant arises, there must be some notice or knowledge of acts causing ouster. *Severson v. McKenzie* 827
3. Notice or knowledge of acts out of which ouster of a cotenant arises may be inferred from acts or circumstances attending adverse possession. *Severson v. McKenzie* 827
4. Where one tenant in common enters upon the entire estate, improves it, pays the taxes, and claims the whole for more than the period of limitations, an actual ouster will be presumed. *Severson v. McKenzie* 827

Torts.

An act wrongfully done by cooperation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally. *Olson v. Hansen* 492

Trespass.

1. Petition to restrain lessor from interfering with lessee's possession and use of filling station *held* sufficient. *Standard Oil Co. v. O'Hare* 89
2. Failure to instruct jury to return verdict for nominal damages in action for trespass, where defendant admitted the trespass, *held* error. *Kochenthal v. Omaha & C. B. Street R. Co* 244

Trial.

1. Where the evidence is insufficient to sustain a verdict for plaintiff, it is error to overrule defendant's motion for a directed verdict in his favor. *Casey v. Chicago B. & Q. R. Co* 11
2. A verdict should not be set aside as a chance or quotient verdict except on a clear showing that it is the result of chance or a quotient verdict. *Glick v. Poska* 102
3. It is error to submit to the jury an issue not supported by evidence. *Olson v. Hansen* 492
4. Ordinarily, a party who would be defeated if no evidence were given on either side must first produce his evidence and rest. *Olson v. Hansen* 492

5. The trial court is invested with a wide discretion in allowing alteration of rules of practice and procedure regarding introduction of evidence. *Olson v. Hansen*.... 492
6. Cross-examination of defendant as to whether he carried liability insurance and whether he employed attorneys acting for him *held* permissible. *Jennings v. Biurvall* 551
7. Where different minds may reasonably draw diverse conclusions from facts, the issues should be submitted to the jury. *Lustgarten v. Harris*..... 663

Vendor and Purchaser.

1. "Marketable title" defined. *Robinson v. Bressler*..... 461
2. Defects in title *held* to authorize a rescission of contract of purchase. *Robinson v. Bressler*..... 461
3. On award of rescission, decree awarding purchaser a lien on the property for amount of purchase price upheld. *Robinson v. Bressler*..... 461
4. On rescission of land contract, purchasers *held* entitled to difference between amount paid and what they had received from sale of part of the land. *Robinson v. Bressler* 461

Venue.

In an action for fraud service on codefendants outside county of forum *held* void. *Lindeman v. Calamus Irrigation District* 1

Waters.

1. A landowner has no right to drain surface water by artificial means onto land of another to his damage, except as authorized by statute. *Warner v. Berggren*.... 86
2. Evidence *held* to entitle plaintiffs to enjoin defendants from draining surface water onto their lands. *Warner v. Berggren* 86
3. A landowner may construct a ditch to drain a pond into a natural watercourse. *Bures v. Stephens*..... 751
4. A landowner who sells a right of way for a drainage ditch, which empties into a natural watercourse thereon, and settles all damage resulting therefrom, cannot thereafter recover damages. *Bures v. Stephens*..... 751
5. Cleaning out and deepening a ditch sufficient to drain a basin, for which an easement exists, does not increase the use. *Bures v. Stephens*..... 751
6. Damages for use of an easement for a drainage ditch cannot be recovered by the owner of the servient estate against the owner of the easement, unless the latter is negligent in its use. *Bures v. Stephens*..... 751

Wills.

1. A parol contract to devise realty and bequeath personalty can be established only by evidence that is clear, convincing, and satisfactory. *Ward v. Hislop* 15
2. Testatrix' conveyance before death of devised lands *held* to work a revocation *pro tanto* of the will. *In re Estate of Kulp* 157
3. An implied revocation of a will should not be permitted to destroy provisions capable of execution. *In re Estate of Kulp* 157
4. Where testatrix before death sold lands devised to pay legacies, the remaining proceeds *held* not to pass to the residuary legatee, but to constitute property not disposed of. *In re Estate of Kulp* 157
5. Legacies payable out of proceeds of lands devised to executors for sale, where testatrix sold the lands before her death, *held* not payable out of proceeds of such sale. *In re Estate of Kulp* 157
6. Evidence *held* to sustain finding that a proffered written instrument was the will of decedent and was duly executed. *In re Estate of Brown* 274
7. A devise in trust providing that only income thereof be paid devisee during her husband's lifetime *held* to be a valid restriction. *In re Estate of Smith* 352
8. In construing a will, the entire instrument will be considered, and a decree entered giving effect to testator's intention. *In re Estate of Skinner* 438
9. Where two provisions of a will are irreconcilable, the later provision will control. *In re Estate of Skinner* 438
10. In a will contest on the ground of undue influence of testator's wife, an instruction stressing the close relationship between husband and wife *held* improper. *In re Estate of Abts* 714
11. In a will contest involving issues of mental capacity and undue influence, instructions on the provisions made by law for a wife in her intestate husband's estate *held* erroneous. *In re Estate of Abts* 714
12. Will construed, and *held* that the survivor of two residuary legatees took the entire residue. *In re Estate of Zimmermann* 812

Witnesses.

1. Permitting an interested witness to testify to a conversation between deceased and his wife *held* not erroneous in view of testimony of decedent's representative. *Banking House of F. Folda v. Higgins* 279
2. Testimony of a witness who testifies falsely in some re-

spects should be considered as to matters concerning which he is corroborated. *Blochowitz v. Blochowitz*..... 385
3. A purchaser seeking to recover the purchase price of stock from deceased seller's estate for breach of warranty may not testify respecting seller's representations. *In re Estate of Schellenberg*..... 584